Supreme Court, U.S.
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No. 091150

In The

Supreme Court of the United States

UNIVERSAL TRADING & INVESTMENT CO., INC.,

Petitioner,

vs.

PETRO MIKOLAYEVICH KIRITCHENKO,
PAVLO IVANOVICH LAZARENKO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Universal Trading and Investment Co., Inc. brought an action under the Racketeer Influenced and Corrupt Organizations Act in United States District Court against Ukraine's former Prime Minister Pavlo Ivanovich Lazarenko, and his co-conspirator, Petro Mikolayevich Kiritchenko, for collection of stolen Ukraine assets located in the United States. The District Court entered summary judgment against Petitioner, holding that it lacked standing to bring the action because an assignment to it of Ukraine's claims against Lazarenko and Kiritchenko was invalid under Ukraine law. Affirming, the Court of Appeals invalidated an Ordinance made by the recently elected Ukraine President – who was Ukraine Prime Minister at the time – signed by Ukraine's First Deputy Prime Minister – now the new Prime Minister. That Ordinance was proposed by the then Ukraine's Minister of Justice – now again Ukraine's Minister of Justice. The District Court also was unaware that, in a case brought by Lazarenko in Ukraine, Ukraine Supreme Court upheld the assignment.

1. In the action brought by Petitioner, a Massachusetts corporation, against Ukraine's former Prime Minister and his apparatchik for assets stolen from Ukraine and located in the United States, must the federal courts give collateral estoppel effect, under the principle of comity among nations, to the decision of Ukraine Supreme Court, discovered

QUESTIONS PRESENTED FOR REVIEW – Continued

shortly after the District Court granted summary judgment against Petitioner, where the failure to recognize the decision prejudices the rights of the Massachusetts corporation and rewards the foreign fugitives from justice?

2. In finding that Ukraine's assignment to Petitioner of Ukraine's claims in the United States against its former Prime Minister and his apparatchik was not an act of state that precluded a federal court from inquiring into its validity, did the District Court wrongly conclude that the act of state doctrine does not apply ordinarily to acts of a foreign government with consequences outside the foreign country's territory?

3. When interpreting the constitution of a foreign State, should a federal court recognize that an organ of the foreign State may have implicit powers under provisions of its constitution to take actions in the foreign nation's interest that do not contradict express limitations of the State's authority, such as the actions taken here by Ukraine Prosecutor General's Office in hiring Petitioner, a non-Ukraine corporation, to collect and freeze converted Ukraine assets abroad and in assigning Ukraine's claims for the assets located in the United States against its former Prime Minister and his apparatchik as compensation for Petitioner's worldwide work for recovery of assets?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are: (1) UNIVERSAL TRADING & INVESTMENT CO., INC., Petitioner; (2) PETRO MIKOLAYEVICH KIRITCHENKO, aka PETRO KIRITCHENKO, aka PETR KIRITCHENKO, aka PETER KIRITCHENKO, aka PETRO KYRYCHENKO, aka PETRO KIRICHENKO, aka PETR KIRICHENKO, aka PETER KIRICHENKO; (3) IZABELLA G. KIRITCHENKO, aka IZABELLA KIRICHENKO; (4) LUDMILA KIRITCHENKO, aka LYUDMILA KIRITCHENKO; (5) PAVLO IVANOVICH LAZARENKO, aka PAVLO LAZARENKO, aka PAVEL LAZARENKO, aka PAUL LAZARENKO; (6) TAMARA PETROVNA LAZARENKO, aka TAMARA LAZARENKO; (7) ALEX LIVERANT; (8) MICHAEL MENKO; (9) JOHNNY E. JOHNSON; (10) BRANCROSS U.S. HOLDINGS, INC., a California Corporation; (11) XANADU PROPERTY HOLDINGS, LLC, a California limited liability company; (12) DUGSBERY, INC., aka DUGSBERRY, INC., a California Corporation; (13) BRANCROSS, LTD., a Cayman Islands corporation; (14) BRANCROSS, LTD., an Isle of Man corporation; (15) ZENETA FOUNDATION, a Liechtenstein corporation trust; (16) EUROPEAN FEDERAL CREDIT BANK, aka EUROFED BANK LIMITED, a banking corporation of Antigua and Barbuda, aka EUROFED CO., a Grenada corporation; (17) SELECTIVE ASSETS, LTD., a British Virgin Islands corporation; (18) ORBY INTERNATIONAL, LTD., a British Virgin Islands corporation; (19) TORQ DEVELOPMENT CORPORATION, a

PARTIES TO THE PROCEEDINGS – Continued

California corporation; (20) LADY LAKE LTD., an Antigua and Barbuda corporation; (21) NEMURO INDUSTRIAL GROUP LTD., an Antigua and Barbuda corporation; (22) FAIRMONT GROUP, LTD., an Antigua and Barbuda corporation; (23) FIRSTAR SECURITIES LTD., an Antigua and Barbuda corporation; (24) GUARDIAN INVESTMENT GROUP, LTD., an Antigua and Barbuda corporation; (25) ABS TRADING, INC., a California corporation, aka ABS TRADING COMPANY, INC., a California corporation, aka ABS ENTERPRISES, INC., a California corporation, Respondents.

Of the parties listed, who either participated or joined in the appellate proceedings, the following parties listed as Respondents in the caption did not participate in the appellate proceedings: JOHNNY E. JOHNSON; BRANCROSS, LTD., a Cayman Islands corporation; BRANCROSS, LTD., an Isle of Man corporation; ZENETA FOUNDATION, a Liechtenstein corporation trust; NEMURO INDUSTRIAL GROUP, LTD., an Antigua and Barbuda corporation; FAIRMONT GROUP, LTD., an Antigua and Barbuda corporation; FIRSTAR SECURITIES, LTD., an Antigua and Barbuda corporation; GUARDIAN INVESTMENT GROUP, LTD., an Antigua and Barbuda corporation; SELECTIVE ASSETS, LTD., a British Virgin Islands corporation; and ORBY INTERNATIONAL, LTD., a British Virgin Islands corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a Massachusetts corporation. There is no parent or publicly held company owning ten percent or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice John Roberts and Honorable Associate Justices of the Supreme Court, pursuant to United States Supreme Court Rule 13, Petitioner Universal Trading & Investment Co., Inc. ("UTICo"), a Massachusetts corporation, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Order of the United States District Court for the Northern District of California, entered September 7, 2007, granting summary judgment to respondents, is unpublished. (Appendix [hereafter "App."] at 6-60.) The judgment entered September 10, 2007 for respondents is unpublished. (App. 61.)

The Order of the District Court, entered October 11, 2007, striking UTICo's Federal Rule of Civil Procedure 59(e) motion, is unpublished. (App. 62-64.)

The Order of the District Court, entered January 10, 2008, denying UTICo's further post-judgment motions, is unpublished. (App. 65-75.)

The Order of the District Court, entered February 8, 2008, denying UTICo's Motion to Set Conference, due to discovery of concealed Ukrainian court decisions undermining the District Court's summary judgment ruling, is unpublished. (App. 76-77.)

The Order of Judges Leavy and Rymer of the United States Court of Appeals for the Ninth Circuit entered February 21, 2008, denying without prejudice UTICo's motion for a limited remand to make Federal Rule of Civil Procedure 60(b) motion, is unpublished. (App. 4-5.)

The Order of the District Court, entered June 16, 2008, denying UTICo's request to make Federal Rule of Civil Procedure 60(b) motion, is unpublished. (App. 78-85.)

The Memorandum of Judges Bea, Trott and Conlan of the Court of Appeals entered September 24, 2009, affirming the District Court's summary judgment to Respondents, is unpublished. (App. 1-3.)

The Order of the Court of Appeals entered November 18, 2009, denying panel rehearing or rehearing en banc, is unpublished. (App. 86-87.)

JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 2009. (App. 1.) The order of the Court of Appeals denying panel rehearing or rehearing en banc was entered on November 18, 2009. (App. 86.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The Congress shall have Power . . . To regulate Commerce with foreign Nations. . . .

U.S. CONST., art. I, § 8, cl. 3.

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST., art. I, § 8, cl. 18.

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal;. . . . No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress. . . . No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in

> such imminent Danger as will not admit of delay.

U.S. CONST., art. I, § 10.

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST., art. II, § 2, cl. 2.

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market

for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained

in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1964.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U.S.C. § 1254(1).

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – . . . (2) citizens of a

> State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties. . . . For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

28 U.S.C. § 1332(a).

STATEMENT OF THE CASE

I. Factual Background

Respondent Pavlo Ivanovych Lazarenko, a former Prime Minister of Ukraine, conspired with Respondent Petro Mikolayevich Kiritchenko to convert over $350 million in Ukraine public assets to themselves, their agents and entities controlled by them worldwide. (App. 91, 118-42; 1 ER 102-39.)[1] Lazarenko and Kiritchenko were wanted in Ukraine and faced charges there for misappropriating public property but refused to surrender the assets. (App. 126-27, 140-42; 1 ER 139.) Lazarenko also was found guilty in the United States District Court of eight counts of money laundering. (4 AER 618-30.)

[1] Citations in addition to Petitioner's Appendix ("App.") are to the Excerpts of Record ("ER") filed by UTICo and Appellee's Excerpts of Record ("AER") filed in the appeal before the United States Court of Appeals for the Ninth Circuit.

Kiritchenko, also convicted in the United States, admitted he converted $60 million from Ukrainian public enterprises, out of which he gave $30 million in bribes to Lazarenko. (UTICo's Appellate Opening Br. at 35.)

Petitioner Universal Trading & Investment Co., Inc. ("UTICo") is a Massachusetts corporation specializing in recovery of international assets. (App. 89-91.) On May 15, 1998 and October 2, 1998, Ukraine Prosecutor General's Office ("UPGO") entered into two agreements with UTICo for recovery abroad and worldwide investigation of the converted Ukraine assets. (App. 93-95; 3 ER 66-67, 91-92.)

On April 13, 1999, two months before UTICo filed this action, UPGO addressed a "statement of Amicus Curiae" to the District Court in support of UTICo. (App. 98-99, 118-42.) On April 30, 1999, Ukraine Prosecutor General Mikhailo Potebenko signed a Power of Attorney to UTICo to conduct legal proceedings in the United States for recovering assets of Lazarenko, Kiritchenko, and their co-conspirators. (App. 99; 3 ER 129-30.)

As contracted payment to UTICo, UPGO on August 11, 1999 made a written assignment to UTICo of Ukraine's claims for the realty assets located in the United States converted by Respondents. (App. 101-02, 143-44.) The value of the realty in Northern California, the claims to which were assigned, is about $30 million, and the assignment was calculated to match the twelve percent interest in the 1998 agreements implemented worldwide, certified by the

Prosecutor General to the President to be in excess of $270 million. (App. 107-08, 153-57.) There is no other assignment or any other remuneration by Ukraine for UTICo's work worldwide.

On June 25, 2002, the President issued the Executive Order 581 that regulated the government procedure for asserting the civil claims outside of Ukraine. (3 ER 166-69; App. 105-06.) Under the procedure adopted by that Executive Order, the Prosecutor General applied before the Cabinet of Ministers for his office to be appointed the responsible body for advancing Ukraine's interests concerning assets of Lazarenko and Kiritchenko abroad by contracting with UTICo. (App. 105-06.)

On July 7, 2003, the Ministry of Foreign Affairs and the Ministry of Justice issued documents stating that they did not object to the implementation of Ukraine Cabinet of Ministers Ordinance No. 38192, dated June 30, 2003, recognizing UPGO as the continuing responsible body for protecting and controlling Ukraine's interests in matters regarding assets of Kiritchenko and Lazarenko abroad. (App. 106-07, 145-50.)

On July 19, 2003, the Cabinet of Ministers, then headed by the recently elected President of Ukraine, referring to the Ministry of Justice document (No. 9-5697), issued Ordinance No. 81506 (signed by the First Deputy Prime Minister who is Prime Minister now). (App. 107, 151-52.) The ordinance approved,

endorsed and ratified UPGO's agreements and work with UTICo. (App. 107, 151-52.)

On September 15, 2003, Ukraine Prosecutor General S. Piskun certified to President Leonid D. Kuchma that UTICo fully had implemented the 1998 agreements by locating and freezing worldwide over $270 million in assets converted by respondents and by facilitating recovery in several jurisdictions. (App. 107-08, 153-57.) Responding to the Prosecutor General's letter, the Ukraine President's Administration – equivalent to the White House Staff – issued a letter of acknowledgment to the Minister of Justice dated October 2, 2003. (App. 108, 158-59.)

II. Proceedings In District Court Before Summary Judgment

Petitioner UTICo filed the original complaint in this case on June 24, 1999. (4 AER 632; 6 ER 8.) The District Court had subject matter jurisdiction under 28 U.S.C. section 1331 because the complaint alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. section 1964. (4 AER 632; 6 ER 8.) It had diversity jurisdiction under 28 U.S.C. section 1332 because UTICo is a citizen of Massachusetts, a State different from the citizenship of any defendants. (4 AER 632; 6 ER 8.)

On August 24, 1999, defendants filed motions to dismiss the first complaint. (6 ER 16-17.) On October 8, 1999, UTICo filed an amended complaint. (6 ER 22.) On January 24, 2000, the District Court granted

defendants' motion to dismiss in part and denied it in part, with leave to amend. (6 ER 43.) The second amended complaint, filed January 20, 2000, involved 25 Defendants and alleged claims under (1) RICO; (2) Conversion; (3) Unjust Enrichment; (4) Breach of Fiduciary Duty; (5) Fraud; (6) Civil Conspiracy; (7) Money Had and Received; (8) Accounting; (9) Fraudulent Conveyances; and (10) Declaratory Relief. (1 ER 89, 141-66; 6 ER 41.) Apart from Lazarenko, named by the World Bank in Washington D.C. as No. 8 on the "Top Ten List of Most Corrupt Leaders" (4 ER 138), and his co-conspirator Kiritchenko, it included their agents, corporations and offshore entities, used for money laundering. (1 ER 90-99.)

On June 2, 2000, the first trial judge in this action, Charles Legge, denied defendants' motion to dismiss the second amended complaint, ruling that the August 11, 1999 assignment was valid and that UTICo was a real party in interest for purposes of standing. (7 ER 57-60.)

III. District Court Grants Summary Judgment

On September 7, 2007, a month before trial, a substituting trial judge, Maxine Chesney, reconsidered Judge Legge's ruling without mentioning it and granted summary judgment on the ground that the 1999 assignment was invalid under Ukraine law. (App. 6-60.) Judgment was entered on September 10, 2007. (App. 61.)

IV. District Court's Findings On Summary Judgment Regarding Kiritchenko's Ukraine Case

In its order granting the motion for summary judgment, the District Court discussed rulings in two Ukrainian court cases challenging the August 11, 1999 assignment in which UTICo was not served and was not a party, one brought by Lazarenko and the other brought by Kiritchenko. (App. 9-19.) On March 4, 2003, the Pechersk municipal court of Kyiv rejected Kiritchenko's claims on the basis they were time-barred. (App. 11.) In dicta, however, the Pechersk municipal court commented that UPGO had no grounds to issue a power of attorney to foreign firms such as UTICo. (App. 11.)

After Kiritchenko appealed, the "Judicial Chamber on Civil Cases of the Court of Appeal of the City of Kyiv" affirmed the decision of the Pechersk municipal court. (App. 11-12.) Kiritchenko filed an appeal with Ukraine Supreme Court on June 27, 2003 but thereafter withdrew it, thus conceding the final denial of his claim. (App. 12.)

V. District Court's Findings On Summary Judgment Regarding Lazarenko's Ukraine Case

The District Court additionally found that Lazarenko filed suit against UPGO and UTICo in the Pechersk municipal court, likewise contending that UPGO's assignment and power of attorney to UTICo were invalid. (App. 15.) On September 3, 2003,

without UTICo's being served or being made a party, the Pechersk municipal court issued a decision in Lazarenko's favor, invalidating both the power of attorney and the UPGO's assignment to UTICo. (App. 15-17.) On July 7, 2005, the appellate court affirmed the Pechersk municipal court's original decision invalidating the assignment. (App. 18-19.)

On August 5, 2005, UPGO appealed the appellate court's decision to Ukraine Supreme Court. (App. 19.) The District Court granted summary judgment under the belief that "[t]o date, the Supreme Court of Ukraine ha[d] not taken action on the appeal." (App. 19.)

VI. District Court's Findings Entitling Defendants To Summary Judgment

The District Court found that, even if the August 11, 1999 assignment failed to cure UTICo's lack of standing when it asserted its initial complaint on June 24, 1999, UTICo's amended complaint, filed after the assignment, did not warrant dismissal on that basis. (App. 22-23.) But it rejected UTICo's argument that the act of state doctrine prevented the District Court from adjudicating the validity of the assignment because of its finding that "the assignment at issue has been declared invalid by the Ukrainian courts." (App. 25.) The District Court additionally found that "the act of state doctrine only precludes inquiry into acts of a foreign government committed within its own territory" and, because the

act of state in question, an assignment permitting UTICo to sue in the United States, "cannot be considered to have been committed in Ukraine[,]" the doctrine did not apply to the present case. (App. 25-27.)

The District Court agreed with UTICo that Ukraine's court decisions declaring the assignment invalid were not enforceable against UTICo because it never received service of process of those actions. (App. 32-34.) But it disagreed with UTICo that California law applied to determine the validity of the assignment and agreed with defendants that the Ukraine court decisions were relevant as evidence of Ukraine law. (App. 35-46.) The District Court conducted its own analysis of Ukraine law "even without consideration of the Ukrainian court decisions" and found that Ukraine Constitution did not permit UPGO to assign claims on behalf of Ukraine. (App. 46-57.)

The District Court additionally rejected UTICo's argument that the May 15, 1998 fee agreement, under which UPGO hired UTICo, provided an independent basis for standing (App. 57-58), and did not address the October 2, 1998 follow-up agreement made by the Prosecutor General, expanding the initial terms. (3 ER 91.) It also did not address Ukraine's certification in 2003 that UTICo had implemented the agreement in full and was entitled to remuneration under its terms. (3 ER 199.)

VII. Ukraine Supreme Court Proceedings In Lazarenko's Case Unknown To District Court Before Granting Summary Judgment

Unknown to the District Court when it granted summary judgment in favor of respondents, on March 24, 2006, Ukraine Supreme Court decided to hear the case. (App. 160-63.) On June 14, 2006, Ukraine Supreme Court reversed the Court of Appeal. (App. 164-72.)

Ukraine Supreme Court rejected the proposition that UPGO lacked authority under Ukraine's Constitution and Civil Code to contract with and to remunerate UTICo. (App. 167-68.) It found that the April 30, 1999 power of attorney furthered Ukraine's material interests by empowering UTICo to obtain judicial decisions against Kiritchenko and Lazarenko in the United States for converting Ukraine property. (App. 168.)

Ukraine Supreme Court upheld the August 11, 2009 assignment between UPGO and UTICo as an authorized "commission agreement, in accordance with which, pursuant to Article 387 of the Ukrainian Civil Procedural Code (ed. 1963), one side (which was empowered) undertakes to accomplish in the name and at the expense of the other side (which empowered) certain legal activities." (App. 168-69.)

Ukraine Supreme Court found that the assignment granted "compensation . . . to the Firm (UTICo) for the works that had already been accomplished."

(App. 169.) Upon remand, Lazarenko did not even try to change the outcome, with the final judgment entered against him on November 30, 2006. (App. 170.)

VIII. Post-Judgment Proceedings In The District Court

On September 18, 2007, UTICo filed a Motion to Alter, Amend and/or Rescind the Summary Judgment Order pursuant to Federal Rule of Civil Procedure 59(e) or, Alternatively, for Stay and to Grant Application for Letters Rogatory to Ukraine. (5 ER 185-88.) UTICo argued among other things that the District Court violated UTICo's due process rights by granting summary judgment before hearing UTICo's motion to compel Lazarenko to produce the docket and other documents in his Ukraine case. (1 ER 186-87.) It also moved to exceed the maximum page length for the Rule 59(e) motion. (5 ER 182-83.)

In its memorandum supporting the Rule 59(e) motion (1 ER 190-230), UTICo argued that the Ukraine court documents, that the District Court previously ordered Lazarenko to produce several times (1 ER 205-06, 228-29), "are particularly relevant to evaluate the inconclusiveness of the Supreme Court's review. The outcome of the review of the Supreme Court could be diametrically different from what was submitted with the defendants' affidavits." (1 ER 206-07.)

On October 11, 2007, the District Court denied UTICo's motion to exceed the maximum page length and struck the Rule 59(e) motion on the ground it exceeded the maximum 25-page length. (App. 62-64.) On October 15, 2007, UTICo filed a notice of appeal from the District Court's orders granting defendants summary judgment and denying and striking its Rule 59(e) motion. (1 ER 3-4.) On January 10, 2008, the District Court denied all UTICo's post-judgment motions, including a motion to refile the Rule 59(e) motion; a refiled, shorter Rule 59(e) motion in compliance with the page limits; and a Renewed Application for the Issuance of a Letter of Request for Official Records. (App. 65-75.) On January 23, 2008, UTICo filed an amended notice of appeal. (1 ER 6-7.)

On February 6, 2008, quickly after UTICo received and filed the June 14, 2006 Ukraine Supreme Court's decision and November 30, 2006 Pechersk municipal court's decision in Lazarenko's case, it filed in the District Court an "Emergency Administrative Request to Set Conference Based Upon Discovery of Fraud Committed By Defendants." In support, UTICo lodged copies of the June 14, 2006 Ukraine Supreme Court's decision and November 30, 2006 Pechersk municipal court's decision in Lazarenko's case. (2 ER 2-20.) On February 8, 2008, the District Court denied UTICo's "Emergency Administrative Motion," finding UTICo's notice of appeal of the summary judgment order divested it of jurisdiction to consider the subject. (App. 76-77.)

On June 16, 2008, the District Court denied UTICo's "Administrative Request for Court's Willingness to Entertain" a proposed motion under Rule 60(b), based upon the newly discovered Ukrainian court documents. (App. 78-85.) It ruled that it "would decline to entertain a Rule 60(b) motion" because (1) there was no evidence that appellees knew of the Ukrainian court decisions that were purportedly concealed or that appellees did anything to hide them; and (2) the allegedly concealed decisions were irrelevant to the summary judgment order because (a) the decision did not find the assignment valid, and (b) the District Court had conducted an independent interpretation of Ukraine law in granting summary judgment. (App. 78-85.)

IX. Proceedings In The Court Of Appeals

UTICo appealed both the summary judgment order and the District Court's denial of post-judgment motions. (1 ER 3-4, 6-7.) On February 21, 2008, the Court of Appeals denied UTICo's motion for remand, based on the newly discovered Ukraine Supreme Court decision in Lazarenko's case, without prejudice. (App. 4-5.)

After the District Court declined to hear UTICo's Rule 60(b) motion, see *ante*, UTICo filed its Opening Brief on May 30, 2008. Among UTICo's arguments were (1) that the June 14, 2006 Ukraine Supreme Court decision in Lazarenko's case reversed previous Ukraine court decisions upon which the District

Court relied in interpreting Ukraine's Constitution (UTICo's Opening Br. at 2, 8-9, 40-41, 46); (2) that the District Court disregarded evidence of UTICo's accrued rights under its implemented agreements with Ukraine (UTICo's Opening Br. at 2, 17-18, 20-21, 33-35, 38-39); and (3) that the District Court improperly discounted the act of state doctrine (UTICo's Opening Br. at 2, 22-23, 39-40).

Accompanying its Reply Brief in the Court of Appeals on October 20, 2008, UTICo requested judicial notice of the March 24, 2006 and June 14, 2006 Ukraine Supreme Court's decisions and November 30, 2006 Pechersk municipal court's decision denying Lazarenko's claim.

On September 24, 2009, a panel of the Court of Appeals, consisting of Circuit Judges Trott and Bea and District Judge Conlon, sitting by designation, affirmed in an unpublished memorandum. (App. 1-3.) The panel considered the District Court's determination regarding standing and interpretation of foreign law de novo. (App. 2.) Discarding UTICo's interests created by the 1998 agreements, the Court of Appeals found that UTICo's "only possible basis of standing was as the assignee of claims belonging to Ukraine. . . ." (App. 2.) Contrary to the District Court's finding that the case did not deserve to be dismissed based on standing merely because the assignment was made after the original complaint (App. 22-23), the panel additionally found that "the purported assignment of claims by Ukraine was a sham created only to overcome defendants' initial

challenge to standing." (App. 2.) However, even if the assignment were not a sham, UTICo still failed to prove the assignment was valid under Ukraine law. (App. 2.)

The panel granted judicial notice of the June 14, 2006 Ukraine Supreme Court decision in Lazarenko's case, approving of the assignment under Ukraine law. (App. 3, n.1.) But the panel failed to address it and, contrary to Ukraine Supreme Court, inexplicably found UTICo "failed to prove a deputy prosecutor had the authority to assign the rights of the Ukrainian government against Kiritchenko and Lazarenko to" UTICo and "failed to demonstrate that the assignment constitutes the act of a foreign sovereign power. . . ." (App. 2.) The panel summarily rejected all other issues raised by UTICo, calling them "meritless." (App. 2-3.) The panel thus declined to consider any supplemental grounds for standing such as UTICo's rights under the implemented agreements with Ukraine, enforcing its equitable lien, constructive trust, and equitable subrogation. (App. 2-3.)

On October 7, 2009, UTICo petitioned for rehearing or rehearing en banc, raising among other grounds, the effect of the June 14, 2006 Ukraine Supreme Court decision discovered subsequent to the District Court's summary judgment order. On November 18, 2009, the same 3-judge panel denied UTICo's petition for rehearing and the suggestion for rehearing en banc. (App. 86-87.)

X. Post-Appellate Events

On February 25, 2010, Victor Yanukovich, after general election, was sworn as the new President of Ukraine. (App. 174.)[2] President Barack Obama immediately congratulated him and appointed the U.S. delegation to attend the inauguration. (App. 173-74.)

The United States Senate passed a resolution "[r]ecognizing the important progress made by the people of Ukraine in the establishment of democratic institutions following the presidential run-off election on February 7, 2010." (App. 175-78.)

The incoming President, Yanukovich, was Prime Minister when, on July 19, 2003, the Cabinet of Ministers issued Ordinance No. 81506, approving, endorsing, and ratifying UPGO's powers in the Kiritchenko-Lazarenko matter and its contract with UTICo. (App. 107, 151-52.)

On March 11, 2010, the parliament voted Nikola Azarov into office as the new Prime Minister. Azarov was the First Deputy Prime Minister (also holding the Finance Minister portfolio) on July 19, 2003. (App. 179.) It was Azarov's signature on Ordinance No. 81506. (App. 151-52.)

Also on March 11, 2010, Alexander Lavrinovich was appointed as the Justice Minister of the new government. (App. 180.) This position was the same

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[2] UTICo requests judicial notice of documents pertaining to events subsequent to the appellate decision.

one he held in 2003, when the Cabinet supported UPGO's relationship with UTICo. (App. 147-49.)

REASONS FOR GRANTING THE WRIT

I. Granting Certiorari Will Enable This Court To Pronounce That It Is Not A Matter Of Judicial Discretion To Deny Comity To A Foreign Supreme Court Judgment – Against The Foreign Party Who Brought The Foreign Proceeding – When Failure To Recognize The Foreign Judgment Results In Dismissal Of The American Plaintiff's Case That Was Not A Party To The Foreign Proceeding

What makes this case different from the cases this Court has visited under the doctrine of comity among nations is that the foreign judgment sought to be enforced is against the foreign national that brought the foreign proceeding. The lower courts' failure to recognize the collateral estoppel effect of the foreign judgment operates to deprive the American party-litigant of its day in court and results in substantial economic hardship for that litigant.

After *Hilton v. Guyot*, 159 U.S. 113, 170-71, 210, 16 S.Ct. 139, 40 L.Ed. 95 (1895), federal courts no longer follow the reciprocity rationale, *Tahan v. Hodgson*, 662 F.2d 862, 867 & n.21 (D.C. Cir. 1981). But courts continue to deny comity to foreign judgments when "to enforce foreign interests" would be "fundamentally prejudicial to those of the domestic

forum." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). On the other hand, federal courts generally recognize foreign country judgments "whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) (citing *Hilton, supra,* 159 U.S. at 202-03).

Notice and opportunity to be heard for the party-litigant affected by the foreign judgment is normally the "polestar" of due process. *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017, 92 S.Ct. 1294, 31 L.Ed.2d 479 (1972) (citing RESTATEMENT (SECOND) CONFLICT OF LAWS, § 92 (Proposed Final Draft 1967)). But here, the foreign judgment was in favor of the American party that was denied notice and opportunity to participate in the proceeding. This case is unlike the usual one, where enforcement of a foreign judgment would prejudice United States citizens denied notice and an opportunity to be heard in the foreign proceeding, *Films by Jove, Inc. v. Berov*, 250 F.Supp.2d 156, 205 (E.D.N.Y. 2003). Here, it is the failure of the District Court to recognize Ukraine Supreme Court's decision in favor of the domestic corporation, UTICo, that prejudices the rights of the Massachusetts corporation and rewards the Ukrainian fugitives from justice.

While in some circuits motions to reconsider judgments under Rule 60(b) on the basis of newly

discovered evidence are "generally not favored," *United States v. International Bd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001), in the circuit where this case arose, a district court abuses its discretion by denying relief from a final judgment, order, or proceeding when it makes an error of law or relies on a clearly erroneous factual determination. *Lemoge v. United States*, 587 F.3d 1188, 1191-92 (9th Cir. 2009). And, if a district court premises such denial upon a legal determination, the legal issue must be reviewed de novo. *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1101 (9th Cir. 2008).

Granting certiorari will enable this Court to pronounce to all federal courts of appeals that comity considerations weigh in favor of reconsidering a final judgment against a United States citizen when a newly discovered foreign judgment has the collateral estoppel effect of resuscitating the United States citizen's case in federal court.

Here, the District Court rested its denial of UTICo's motion for reconsideration under Rule 60(b) on an error of law; namely, that the newly discovered Ukraine Supreme Court decisions in Lazarenko's case and the final denial of his claim to invalidate the assignment were irrelevant to its own interpretation of Ukraine law. (App. 82-83.) Review of Ukraine Supreme Court's decision shows that it substantively reached the validity of UPGO's contractual relationship with UTICo under Ukraine law. (App. 167-70.)

Significantly, a district court sitting in the Second Circuit, where motions to reconsider are disfavored, acknowledged the relevancy of a posthumously discovered Russian high court decision to its judgment in a copyrights dispute, based on an issue requiring interpretation of Russian law. *Films by Jove, Inc., supra*, 250 F.Supp.2d at 190-91. The reason the district court in *Films by Jove, Inc., supra*, decided not to accord the Russian high court decision collateral estoppel status in the proceeding before it was that the American film company that would be hurt by giving preclusive effect to the Russian court's findings was not a party to the Russian litigation. *Id.* at 191. Indeed, the district court stated that, "[i]n the ordinary case," it "would be inclined to adopt the High Arbitrazh Court's positions with respect to issues of Soviet law." *Id.* at 196. Further, the district court stated it might have deferred to what it characterized as the Russian High Court's "clearly erroneous decision," if the "decision impacted only the rights of Russian parties. . . ." *Id.* at 205. However, because the Russian High Court's ruling resulted in substantial economic hardship to a non-Russian American party, the district court declined to enforce it. *Id.*

Here, contrastingly, it is the failure to enforce Ukraine's highest court's decision that affects substantial economic hardship on UTICo, a non-Ukrainian American party, by resulting in the dismissal of its case in federal court. Issue preclusion against the Ukrainian party respondents is necessary to prevent manifest injustice because they were the

ones who brought and had full opportunity to participate in Ukraine court proceedings ultimately decided against them. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931).

UTICo was not a party to the Ukraine court proceedings. But it still may rely on the doctrine of collateral estoppel to preclude respondents from relitigating issues decided against them in Ukraine court decisions. *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 328-29, 91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788 (1971).

Ukraine Supreme Court's earlier decision in Kiritchenko's case could not have been a final adjudication of UTICo's rights against Kiritchenko because of the failure of Ukraine courts to obtain personal jurisdiction over UTICo. The Ukraine courts found his claim barred by statutes of limitations, the final adjudication was against Kiritchenko; and any comments to the contrary in the decisions were obiter dicta. (AER 251 [3/4/03 decision, "rejecting" Kiritchenko's claim]; AER 270 [5/29/03 decision upon Kiritchenko's claim "rejected"]; 4 ER 171 [1/26/04 decision, stating "relief was denied"]; AER 308 [3/11/04 decision, stating "action . . . was denied"]; AER 338 [2/3/05 decision, stating "action was denied"].)

To the extent Ukraine court decisions denying Kiritchenko's claim express dicta in conflict with the latest Ukraine Supreme Court decision in Lazarenko's case, the latest judgment governs under the traditional conflict of laws rule. *See* RESTATEMENT

(THIRD) OF FOREIGN RELATIONS LAW, § 482, cmt. g (1987) ("Courts are likely to recognize the later of two inconsistent foreign judgments."); *see also Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 75-78, 60 S.Ct. 44, 49-51, 84 L.Ed. 85 (1939) (applying the rule domestically to inconsistent state court judgments). Also, under principles of stare decisis in this country, dicta "may be followed if sufficiently persuasive" but are not binding. *Central Green Co. v. United States*, 531 U.S. 425, 431, 121 S.Ct. 1005, 148 L.Ed.2d 919 (2001) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 627, 55 S.Ct. 869, 79 L.Ed. 1611 (1935)).

It is true that, for this Court, "the rule of stare decisis is not an 'inexorable command.'" *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). But lower federal courts in this country are bound to follow the latter of two inconsistent United States Supreme Court holdings. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) ("[O]nly this Court may overrule one of its precedents.").

The June 14, 2006 Ukraine Supreme Court ruling was the last and final word from Ukraine's highest court on the validity of the assignment under Ukraine law, that both Kiritchenko and Lazarenko had challenged in Ukraine *in absentia*. (App. 164-72.) In disregarding this decision, the lower federal courts substituted their own interpretation of Ukraine's Constitution for the interpretation of Ukraine's own highest court. (See Section III, *post*.)

II. The Court Should Grant Certiorari Because The Lower Courts' Refusal To Enforce Acts Of Ukraine's Government Outside Ukraine That Are Consistent With United States Policies Improperly Expands The Role Of The Judicial Branch Into The Conduct Of United States Foreign Relations

The June 14, 2006 Ukraine Supreme Court decision in Lazarenko's case, affirming the validity of the assignment, overturns the District Court's primary reason for refusing to apply the act of state doctrine, that "the assignment at issue ha[d] been declared invalid by the Ukrainian courts." (App. 25.) The District Court's second reason for finding the act of state doctrine inapplicable, that the assignment was made to recover assets in the United States (App. 25-27), created an unprecedented and sweeping general rule with disturbing consequences for the act of state doctrine by conditioning its application on the requirement that the act of the foreign government be done for a purpose that must be completed within the foreign country's territory.

Any time the judicial branch wrongly decides not to apply the act of state doctrine, there is the potential for embarrassment to the Executive Branch in the conduct of foreign relations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("An inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made,

would be likely to be highly offensive to the state in question."); *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) ("The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government.").

Here, there is demonstrated backing of the United States President and Senate to the incoming President of Ukraine and members of his Cabinet who were in the government that supported UPGO's hiring of UTICo. (App. 173-81.) This reality makes it more than an abstract possibility that the lower courts' decision not to apply the act of state doctrine will have an adverse effect on relations with Ukraine.

The District Court incorrectly relied on cases applying a rule of decision for acts of confiscation that appellate courts also have applied to human rights violations such as state-planned murder. (App. 26-27 and cases cited therein.) It wrongly concluded that the act of state doctrine "ordinarily" does not apply to acts of a foreign government when they contemplate consequences outside the foreign country's territory. (App. 26.)

Numerous decisions of this Court demonstrate that the "traditional formulation" of the act of state doctrine as applying to acts of a foreign government "committed within its own territory," *Banco Nacional*

de Cuba v. Sabbatino, supra, 376 U.S. at 401, or "done within its own territory," *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897), is not to be read so literally. *See Shapleigh v. Mier*, 299 U.S. 468, 474-76, 57 S.Ct. 261, 81 L.Ed. 355 (1937) (Fact that land taken under law of Mexico was not part of Texas because of avulsion of Rio Grande and treaty did not alter effect if prior Mexican decree.); *Ingenohl v. Walter E. Olsen & Co.*, 273 U.S. 541, 544, 47 S.Ct. 451, 71 L.Ed. 762 (1927) (In case involving effect of act of United States Philippines's government abroad: "Of course, a foreign state might accept the Custodian's transfer as good within its jurisdiction, if there were no opposing local interest or right."); *Texas Co. v. Hogarth Shipping Corporation*, 256 U.S. 619, 631, 41 S.Ct. 612, 65 L.Ed. 1123 (1921) ("That the charter party was entered into in this country is not material. The important consideration is that it became impossible of performance through a supervening Act of State which operated directly on the ship and the parties could not avoid."); *Ricaud v. American Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 62 L.Ed. 733 (1918) (Act of Mexican government affecting title to bullion continued to have effect after bullion was brought into United States); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303, 38 S.Ct. 309, 62 L.Ed. 726 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims

for damages were based upon acts done in a foreign country.").

The arbitrary general rule created by the District Court not to apply acts of state with extraterritorial effects is actually a distortion of the well-established principle that, where the purpose of the foreign government's act is to confiscate property located outside the foreign territory, United States courts will not enforce the act unless it furthers United States policy. *See Banco Nacional de Cuba v. Sabbatino*, *supra*, 376 U.S. at 454 (White, J., dissenting) (referring to "the public policy test traditionally applied to extraterritorial takings of property, even though embarrassing to foreign affairs"); *Republic of Iraq v. First Nat. City Bk.*, 353 F.2d 47, 51 (2d Cir. 1965), citing RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 46 (Proposed Official Draft, 1962) ("[W]hen property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'"); *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255, 259 (2d Cir. 1956) ("[F]oreign acts of confiscation are presumed to be against the public policy of the forum [citations] absent a treaty or other indication of a public policy to do so. . . .").

In permitting the District Court's conclusion to go unchecked, the Court signals approval of the Judicial Branch's passing on the validity of an entire category of foreign acts of state that it previously taught was dangerous to foreign policy for domestic courts to be

engaged in adjudicating; namely, acts committed within a foreign State consistent with United States policy. *See Banco Nacional de Cuba v. Sabbatino, supra*, 376 U.S. at 423 ("The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."); *First Nat. City Bank v. Banco Nacional de Cuba, supra*, 406 U.S. at 764 (observing that the act of state doctrine is "buttressed by judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties").

Indeed, if the District Court's reformulation of the act of state doctrine were to be accepted, then even the decrees of foreign governments sought by the United States to protect American interests would be subject to judicial scrutiny if their purposes contemplated effects outside the territory of the foreign government. There is no reason to make judicial scrutiny of acts of state dependent in most cases on the territorial location of the act's purpose. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 728, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) (Powell, J., concurring) ("question[ing] the wisdom of attempting the articulation of any broad exception to the act of state doctrine within the confines of a single case").

The District Court's unprecedented exception to the act of state doctrine for acts of a foreign government with extraterritorial purposes conflicts with United States Supreme Court precedents such as *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937), and *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942). In those cases, as an incident of recognition of the Soviet Union, the United States sought to enforce an assignment to it by the Soviet Union in 1933, of nationalized assets of Russian nationals located in the United States ("the Litvinov Assignment"). *Belmont*, *supra*, 301 U.S. at 326; *Pink*, *supra*, 315 U.S. at 211-13. In *United States v. Belmont*, "[t]he court below . . . took the view that the situs of the bank deposit was within the state of New York; that in no sense could it be regarded as an intangible property right within Soviet territory; and that the nationalization decree, if enforced, would put into effect an act of confiscation." 315 U.S. at 327. Reversing the lower court and rejecting the view that the Soviet act of state was a taking in violation of the Fifth Amendment of the United States Constitution, this Court held, "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled." 315 U.S. at 332.

In *United States v. Pink*, *supra*, the Court again considered whether it should find the Litvinov

assignment to be an act of state, this time in the context of the Russian Government's nationalization in 1918 and 1919 of the insurance business. 315 U.S. at 210-11. The Litvinov assignment included assets of the New York branch of the First Russian Insurance Company that remained in possession of the New York insurance authority after American creditors' claims against the company had been paid, which the United States sought to recover first in federal and then in State court. *Id.* at 211-13. While the litigation in State court was pending, a New York Court of Appeals in another case held that the Russian decrees had no extraterritorial effect, *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 20 N.E.2d 758, 767 (N.Y. 1939), *aff'd sub nom. United States v. Moscow Fire Ins. Co.*, 309 U.S. 624, 60 S.Ct. 725, 84 L.Ed. 986 (1940), resulting in a dismissal of the United States' complaint in the lower State court. *Pink*, *supra*, 315 U.S. at 215, 217. If the New York Court of Appeals was correct that the Russian 1917 and 1918 confiscation decrees had no extraterritorial effect, "then Russia had nothing here to assign." *Id.* at 217.

On certiorari, the United States Supreme Court found the declaration of the Soviet Government's intent persuasive. *Pink*, *supra*, 315 U.S. at 221-22. Following *Belmont, supra,* 315 U.S. at 332, it held that the Russian decrees intended to have extraterritorial effect and did affect the New York assets of the First Russian Insurance Company. *Id.*

This Court observed in *Pink*, *supra*, that "[i]t is one thing to hold as was done in *Guaranty Trust Co. v. United States*, *supra*, 304 U.S. page 142, 58 S.Ct. page 793, 82 L.Ed. 1224, that under the Litvinov Assignment the U.S. did not acquire 'a right free of a pre-existing infirmity' such as the running of the statute of limitations against the Russian Government, its assignor." 315 U.S. at 222. But it was quite another thing "to deny enforcement of a claim under the Litvinov Assignment because of an overriding policy of the State which denies validity in New York of the Russian decrees on which the assigned claims rest." *Id.*

The District Court's refusal to give extra-territorial effect to the August 11, 1999 assignment is inconsistent with United States policies that (1) permit foreign nations to sue in this country; and (2) permit assignment of RICO causes of action. *See Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986) ("[A]n action brought by a foreign government against its former head of state arises under federal common law."); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496-98, 105 S.Ct. 3292, 87 L.Ed.2d 346 (1985) (broadly construing RICO). An assignee of the Philippines's rights against Marcos could not sue under the reasoning for the District Court's decision.

"RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, see *United States v. Turkette*, 452 U.S. 576, 586-87 [101 S.Ct. 2524, 69 L.Ed.2d 246] (1981), but also of its express admonition that RICO

is to 'be liberally construed to effectuate its remedial purposes,' Pub.L. 91-452, § 904(a), 84 Stat. 947." *Sedima, S.P.R.L. v. Imrex Co., Inc., supra*, 473 U.S. at 497-98; *see also Russello v. United States*, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983) ("The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.").

Thus in *Sedima*, this Court, rejecting limits on standing that would have required a RICO plaintiff to allege a "racketeering injury" rather than an injury "simply caused by the predicate acts," held that there is "standing if . . . he has been injured in his business or property by the conduct constituting the violation." 473 U.S. at 485, 496. In *Lerman v. Joyce International, Inc.*, 10 F.3d 106, 112-13 (3d Cir. 1993); Justice Alito held that claims for RICO injuries were transferrable under a general assignment of "all . . . causes of action" and "claims . . . of whatsoever nature" that eliminated the possibility of split recoveries or duplicative liability by extinguishing the assignor's right to assert RICO claims. *Accord United States ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (holding that "[a]s a general rule, terms of art are not required for a valid Assignment").

As in *Lerman, supra*, 10 F.3d at 112-13, the August 11, 1999 assignment, based on the implemented 1998 agreements, was broadly written to transfer to UTICo all of Ukraine's claims to the United States-located realty converted by respondents, including

those for injuries from predicate acts under RICO. (App. 143-44.) Because the United States realty assets that Ukraine assigned, identified property by property in the April 13, 1999 Amicus Letter of Ukraine (App. 139) counted towards but did not satisfy the twelve percent remuneration that UTICo already earned (App. 144, 168-69), the assignment completely relinquished all of Ukraine's interest in the assets.

Far from an act of confiscation, the assignment compensates a Massachusetts corporation for returning assets abroad to the State that is their rightful owner. *Cf. Republic of Philippines v. Marcos, supra,* 806 F.2d at 360 ("The complaint seeks recovery of property illegally taken by a former head of state, not confiscation of property legally owned by him.").

The District Court's refusal to apply the act of state doctrine ignores the Congress's directive to liberally construe RICO to effectuate its remedial purpose. *Sedima, supra,* 473 U.S. at 497-98. It opened the door to an inquiry into the validity of Ukraine's assignment, an act consistent with United States policy, and resulted in the release of stolen Ukraine assets into United States commerce. *See Republic of Philippines v. Marcos,* 818 F.2d 1473, 1491 (9th Cir. 1987) (Holcomb Hall, J., concurring in part and dissenting in part) ("In passing RICO, Congress was concerned with the effect of organized crime on the economy of the United States."), *reh'g granted, Republic of the Philippines v. Marcos,* 862 F.2d 1355 (1988).

"It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice." *Republic of Iraq*, *supra*, 353 F.2d at 50. The voice of the lower courts in this case is that the United States views all official acts of a foreign nation like acts of confiscation, with skepticism and distrust if they are intended to affect property outside the foreign nation's borders, even if such acts are in accord with United States policy. This impression needs to be reviewed and corrected.

III. The District Court's Interpretation Of Ukraine's Constitution As Consisting Of Limited Enumerated Powers And Not Permitting Implied Powers Deprives Ukraine Of Powers Other Foreign Governments Enjoy Under International Law To Reclaim Public Assets Transported From Ukraine Illegally

The District Court's decision not to apply the act of state doctrine made it embark on the difficult task of interpreting whether UPGO had authority under Ukraine's Constitution to hire UTICo to track and freeze the assets of Kiritchenko and Lazarenko abroad and to assign UTICo Ukraine's claims to assets located in the United States as compensation for UTICo's contracted work worldwide on the recovery of the converted assets. (App. 46-57.)

One of the traditional justifications for the act of state doctrine is the absence of consensus concerning a particular area of international law. *See Sabbatino*,

supra, 376 U.S. at 428 ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . "). Here, the absence of consensus on philosophies of interpreting our own constitution should have alerted the District Court that the circumstances were consistent with one of the traditional justifications for the act of state doctrine.

Opposing defendants' motion for summary judgment, UTICo submitted declarations of Ukraine law experts, scholars on the law, who opined that UPGO has implicit powers under Ukraine's Constitution to take actions in the State's interest that do not contradict express limitations of its authority, such as the assignment here to UTICo. (App. 50-54 [discussing Declarations of Professors Valery Ivanovich Kusnetsov, Viktor Fedorovich Pogorelko and Vratislav Pechota].) The conclusion that Ukraine's Constitution did not permit UPGO to assign claims on behalf of Ukraine (App. 54-55) frustrates Ukraine's ability to act in its interest abroad and deprives Ukraine of powers other sovereigns enjoy under international law.

Take this Court's early cases interpreting our constitution, for instance. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406, 4 L.Ed. 579 (1819), stated, "Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or

implied powers, and which requires that everything granted shall be expressly and minutely described."

The District Court's interpretation of Ukraine's Constitution, adopted in 1996, was one that strictly limits the powers of governmental entities to those enumerated and leaves no organ of the State with the authority to prosecute illegal transportation of public property outside the country or to enter into contracts with private companies abroad to do so. (App. 46-57.) That proposition means that as soon as Lazarenko and Kiritchenko converted Ukraine's assets and hid those outside its borders, Ukraine could not contract with any non-Ukraine entity for recovery of such stolen assets.

Like the Commerce and Necessary and Proper clauses, Articles of Ukraine's Constitution that grant UPGO authority to represent the interests of Ukraine in judicial bodies should be broadly interpreted so as not to frustrate government action and to effectuate the purposes of the Articles. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (broadly construing U.S. CONST., art. I, § 8, cl. 3); *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (same); *McCulloch v. Maryland, supra*, 17 U.S. (4 Wheat.) 316 (broadly interpreting U.S. CONST., art. I, § 8, cl. 18).

The theory of enumerated powers developed in the United States as an appropriate consideration for interpreting the federal constitution, which "creates a federal government of enumerated powers." *United*

States v. Lopez, 514 U.S. 549, 552, 115 S.Ct. 1624, 131 L. Ed. 2d 626 (1995); *see also Marbury v. Madison*, 5 U.S. (Cranch) 137, 176, 2 L.Ed. 60 (1803) (Marshall, C. J.) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). But modern Ukraine did not form similarly from a confederacy of independent states to which powers over matters not enumerated in Ukraine's Constitution can be reserved. THE FEDERALIST NO. 45 (James Madison) ("The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."); *see generally* HERBERT WESCHLER, *The Political Safeguards of Federalism: The Role of the States in the Selection and Composition of the Federal Government*, 54 COLUM. L. REV. 543 (1954).

Assuming it is acceptable to refer to United States history to interpret Ukraine's Constitution, during formation of the United States, the States yielded power over controversies affecting foreign relations to the federal government. THE FEDERALIST NOS. 41-42, 44 (James Madison). So was that sentiment expressed in the powers enumerated in the Constitution to conduct foreign policy. U.S. CONST., art. I, § 10; art. II, § 2. So is that sentiment honored today in our jurisprudence. *See Republic of Philippines v. Marcos, supra*, 806 F.2d at 354 ("The question

whether to honor such a request by a foreign government is itself a federal question to be decided with uniformity as a matter of federal law, and not separately in each state . . . ").

The Court of Appeals did not review meaningfully the District Court's interpretation of Ukraine's Constitution. The District Court's view leaves no organ of government with power to assign Ukraine's rights to non-Ukraine corporations such as UTICo to reclaim stolen assets located outside Ukraine.

CONCLUSION

Wherefore, it is respectfully requested that the petition for writ of certiorari be granted and the decision of the Court of Appeals be reversed.

Respectfully submitted,

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MARCH 2010

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNIVERSAL TRADING & INVESTMENT COMPANY, INC., Plaintiff-Appellant, v. PETRO MIKOLAYEVICH KIRITCHENKO, *et al.*, Defendants-Appellees.	No. 07-16873 D.C. No. 3:99-CV-3073-MMC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted September 15, 2009
San Francisco, California

(Filed Sep. 24, 2009)

Before: TROTT and BEA, Circuit Judges, and CONLON,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Suzanne B. Conlon, United States District Judge for the Northern District of Illinois, sitting by designation.

Universal Trading & Investment Co. ("UTI") appeals the district court's order granting summary judgment in favor of defendants. We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* the district court's determination regarding standing, as well as the district court's interpretation of foreign law. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir. 2009); *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995). We affirm.

UTI's only possible basis of standing was as the assignee of claims belonging to Ukraine, and UTI bore the burden of proving the assignment's validity. *Britton v. Co-op Banking Group*, 4 F.3d 742, 746 (9th Cir. 1993). The district court did not err in concluding the assignment was invalid under Ukrainian law. The purported assignment of claims by Ukraine was a sham created only to overcome defendants' initial challenge to UTI's standing. Even were it not, UTI failed to prove the assignment was valid under Ukrainian law. UTI failed to prove a deputy prosecutor general had the authority to assign the rights of the Ukrainian government against Kiritchenko and Lazarenko to UTI. UTI has also failed to demonstrate that the assignment constitutes the act of a foreign sovereign power; the act of state doctrine is therefore inapplicable. *See Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989) ("The burden of proving acts of state rests on the party asserting the applicability of the doctrine").

We have considered the other issues raised by UTI in its opening brief and reject them as meritless.

Issues raised for the first time in UTI's reply brief are waived.[1] *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996).

AFFIRMED.

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[1] Appellees' motion to strike portions of UTI's reply brief is denied as moot. UTI's motion for this court to take judicial notice of three certified Ukrainian court decisions is granted.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNIVERSAL TRADING & INVESTMENT COMPANY, INC., Plaintiff-Appellant, v. PETRO MIKOLAYEVICH KIRITCHENKO; et al., Defendants-Appellees.	No. 07-16873 D.C. No. CV-99-03073-MMC Northern District of California, San Francisco ORDER (Filed Feb. 21, 2008)

Before: LEAVY and RYMER, Circuit Judges.

Appellee's motion to dismiss this appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief. *See Nat'l Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (stating that merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss).

Appellant's motion for a preliminary injunction pending appeal is denied. *Cf. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

Appellant's motion for a limited remand is denied without prejudice to a renewed motion accompanied by an indication that the district court is willing to entertain the proposed Federal Rule of Civil

Procedure 60(b) motion. *See Crateo v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976).

The opening brief is due March 24, 2008; the answering brief is due April 23, 2008; and the reply brief is due within 14 days after service of the answering brief.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNIVERSAL TRADING & INVESTMENT CO.,

Plaintiff

v.

PETRO MIKOLAYEVICH KIRITCHENKO, et al.,

Defendants.

/

No. C-99-3073 MMC

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE: STANDING; GRANTING PLAINTIFFS' MOTIONS TO SUPPLEMENT RECORD

(Docket Nos. 843, 1028, 1043, 1196)

(Filed Sep. 7, 2007)

Before the Court is the motion for summary judgment filed by defendants Peter Kiritchenko, Izabella Kiritchenko, and Ludmilla Kiritchenko (collectively, "Kiritchenko"), by which motion Kiritchenko contends plaintiff Universal Trading & Investment Co. ("UTI" or "UTICo") lacks standing to bring the instant action. Defendants Brancross U.S. Holdings, Inc., BRC Property Holdings LLC, Xanadu Property Holdings, LLC, ABS Trading, Inc., and Michael Menko, collectively, have filed a joinder in Kiritchenko's motion. Separate joinders have been filed by, respectively, defendant Eurofed Bank Limited; defendants Alex Liverant and Torq Development Corporation; and defendants Pavel Lazarenko and Tamara Lazarenko (collectively, "Lazarenko"). UTI has filed opposition to the motion, to which Kiritchenko has replied. With

permission of the Court, UTI has supplemented its opposition with three previously-filed declarations on Ukrainian law; Kiritchenko, with the Court's permission, has filed a surreply addressing such declarations.

Also before the Court are three motions filed by UTI seeking permission to further supplement the record. With respect to each such motion, Kiritchenko has filed opposition and UTI has filed a reply.

Having reviewed the papers filed in support of and in opposition to the motions, the Court rules as follows.

BACKGROUND

The instant action was filed June 24, 1999, and is based on the allegation that defendants were participants in "a criminal organization and enterprise designed to steal large sums of money from the Government of Ukraine[.]" (*See* Second Amended Complaint ¶ 32.) UTI alleges the Prosecutor General of Ukraine has "assigned, for consideration, the right of recovery of damages and/or assets for the claims" to UTI. (*See id.* ¶ 1.) Thus, UTI claims standing as an assignee of Ukraine's claims.

The purported assignment is a document dated August 11, 1999, on letterhead of the Prosecutor General's Office of Ukraine ("PGOU"), which document is addressed to U.A. Lambert ("Lambert"), president of UTI, and signed by M.S. Obykhod, "Deputy

Prosecutor General of Ukraine" ("Obykhod"). (*See* Clements Supp. Decl. Ex. A.)[1] The document provides:

> Taking into consideration the scope of work performed and support provided by your company, as well as civil action by UTIC with regard to real estate located in the United States which may belong to Ukrainian citizens P. M. Kyrychenko,[2] his family members, P. I. Lazarenko, and four Californian companies controlled thereby, i.e., Dugsbery Inc., Brancross U.S. Holdings Inc., Property Holdings, LLC, and Xanadu Property Ho[l]dings, LLC, we hereby confirm our agreement that the Ukrainian party will assign to UTIC material claims with regard to the abovementioned real estate to the extent that you can prove in your Federal Court the unlawful ownership of such real estate, provided that the sum thereof will be credited, in future, to the amount of payment to be made by the Ukrainian party for your services, not

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[1] The text of all Ukrainian documents quoted in this order are English translations of the original documents. In light of the declaration of Mariam Nayiny, president of IDEM Translations, Inc., attesting to the accuracy of the translations, and defendants' failure to submit evidence that any of the translations quoted herein are materially inaccurate, defendants' objections to such translations are overruled.

[2] To the extent the spelling of any name contained in a quotation from a translated document differs from the spelling used in the complaint or other document referenced herein, the Court has retained the spelling used by the translator of such document.

> exceeding 12% of all funds to be returned to Ukraine from abroad with the assistance of UTIC as provided by Letter No. 12-01379-97 dated May 15, 1998, and Letter No. 12-11015-97 dated October 2, 1998, of the Office of the Prosecutor General of Ukraine.

(*See* Clements Supp. Decl. Ex. A.) Lambert testified at his deposition that the August 11, 1999 assignment reduced to writing a prior oral assignment. (*See* Clements Decl. Ex. B (Lambert Dep.) at 89:4-14.) Obykhod attests, however, that "[p]rior to August 11, 1999, there were no written or oral assignments of claims from the Office of the Prosecutor General or the government of Ukraine to UTI." (*See* Roman Decl. Ex. 1 (Obykhod Decl.) ¶ 5.)

The validity of the August 11, 1999 assignment to UTI has been litigated in Ukrainian courts in two separate actions.

A. Kiritchenko Ukrainian Lawsuit

Kiritchenko filed suit against the PGOU and "third person" UTI in the Pechersk regional court in the city of Kiev ("Pechersk court"), seeking to invalidate the assignment and a prior power of attorney.[3]

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[3] A document titled "Power of Attorney," dated April 30, 1999, provides:

> By virtue of this Power of Attorney, I. Mykhailo Olexiovych Potebenko, Prosecutor General of Ukraine with reference to our outgoing document #12-11015-97 of 13.04.99, empower UTICo., U.S. federal I.D.

(Continued on following page)

#04-3181148, at: 33 Almont Street, Winthrop-Boston, MA 02152, USA, on the basis of collected information about the property in the USA of citizens of Ukraine Petro Mikolaievich Kiritchenko and Pavlo Ivanovich Lazarenko, acquired by them for proceeds of crime, in view that they are charged with crimes including misappropriation of the State and public property of Ukraine in especially large scale, to organize and to implement in the USA the legal work, seeking judgment on attaching such assets, including the real estate property held by the above Ukrainian citizens in the names of Dugsbery Inc., Brancross U.S. Holdings, Inc., BRC Property Holdings, LLC, Xanadu Property Holdings, LLC., and for further representing for Ukraine the material claims of Ukraine upon such assets, in accordance with the Ukrainian laws and in accordance with the judicial decisions and judicial proceedings in Ukraine. In particular UTICo. is empowered to involve in the necessary judicial proceedings in USA and for accomplishing designated juridical tasks in presenting Ukraine's material claims the law firms and lawyers, selected by UTICo., including but not limited to: Hale and Door, 60 State Street, Boston, MA 02109; Law Offices of Robert D. Carrow, 1 Embarcadero Center, Suite 880, San Francisco, CA 94111; Law Offices of Philip R. Boncore L.L.P., 1140 Saratoga St., Boston, MA 02128, and to relieve those from such juridical tasks.

The present Power of Attorney is valid for one year from the date of its issuance. If judicial procedures are initiated outside of Ukraine in respect of the above-mentioned assets, then this Power of Attorney will be prolonged for the whole term of such judicial procedures.

This Power of Attorney is executed in the name of the Prosecutor General Office of Ukraine by myself, Mykhailo Olexiovych Potebenko, Prosecutor General of Ukraine, which I confirm by my personal signature.

(Continued on following page)

(*See* Romanova Decl., filed June 2, 2006, Ex. A at 1.) On March 4, 2003, the Pechersk court issued a written decision holding that the PGOU "had no legal basis to issue the Power of Attorney to the foreign firm UTI . . . to conduct the case concerning the Defendant P.M. Kyrychenko, and to entrust it with the right of representation of the material claims of Ukraine[.]" (*See id.* at 3.)[4] The Pechersk court also rejected the assignment on the ground that "there are no references to the laws which would give the General Prosecutor's Office of Ukraine grounds to transfer to UTI Co unrestricted authorities on concession of the material claims concerning property[.]" (*See id.*) The Pechersk court nonetheless rejected Kiritchenko's claim on the ground that it was time-barred under the applicable three-year statute of limitations. (*See id.*)

The PGOU appealed, arguing that although the trial court was correct in rejecting Kiritchenko's suit as untimely, it erred in finding the assignment and power of attorney invalid. (*See* Clements Decl. Ex. M.) Kiritchenko also appealed, apparently arguing that the trial court erred in dismissing his claim as

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(*See* Lambert Decl. in Opposition to Motion to Expunge and in Support of Injunctive Relief, filed August 2, 1999, Ex. A.)

[4] Each of the Ukrainian court decisions issued in the Kiritchenko matter has been authenticated pursuant to the requirements of Rule 44(a)(2) of the Federal Rules of Civil Procedure and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. (*See* Romanova Decl., filed June 2, 2006, ¶¶ 3-5 and Exs. A-E.)

time-barred.[5] (*See id.* Ex. O.) On May 29, 2003, the "Judicial Chamber on Civil Cases of the Court of Appeal of the City of Kyiv" affirmed the decision of the Pechersk court. (*See* Romanova Decl. Ex. B.)[6]

Kiritchenko filed an appeal with the Supreme Court on June 27, 2003, but thereafter withdrew his appeal. (*See* Lambert Decl., filed September 8, 2006, Ex. F.) There is no evidence before this Court that the PGOU appealed the decision of the appellate court to the Ukraine Supreme Court.

On October 17, 2003, however, the PGOU filed a "petition for review" with the Pechersk court, arguing that the Cabinet of Ministers of the Ukraine, on July 19, 2003, "agreed to the proposal of the Ukrainian Ministry of Justice to appoint the Ukrainian Prosecutor General's Office as authority responsible for the *organization* and *continuation* of any activities intended to protect the state's property interests in cases related to the returning of P.M. Kiritchenko's

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[5] A copy of Kiritchenko's appeal has not been filed with this Court.

[6] Petro Konstantinovich Ryabenko, a Ukrainian attorney, relying on Article 317 of the Civil Code of Ukraine, attests: "Although the Ukrainian courts . . . held that Mr. Kiritchenko failed to file his action within the three-year statute of limitations, under Ukrainian law, this does not transform the court's findings regarding the legal validity of the Assignment and Power of Attorney into 'dicta.' Every finding made by the Kiev Regional Court and affirmed and adopted by the Kiev Court of Appeal has legal force and effect." (*See* Clements Decl. Ex. FF (Ryabenko Decl.) ¶¶ 9-10.)

and P.I. Lazarenko's property to the Ukraine." (*See* Clements Decl. Ex. Q at 2 (emphases in original).) The PGOU argued that said "assignment by the Ukrainian Cabinet of Ministers confirms and approves" the prior agreements between the PGOU and UTI.[7] (*See id.*)

Thereafter, on February 20, 2004, the PGOU filed an "additional petition for review," in which it argued that UTI, on December 10, 2003, had notified the PGOU that UTI "had received no notification as to the time, date, or venue of the case proceedings in question" due to court error in addressing notices to UTI. (*See id.* Ex. R at 2.) The PGOU further argued that the court's notices to UTI were "in violation of the procedures determined by the Hague Convention" on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention"). (*See id.*)

On March 11, 2004, the Pechersk court denied the PGOU's petitions for review. (*See* Romanova Decl. Ex. C.) The Pechersk court stated that the approval of the Cabinet of Ministers "cannot be accepted by the

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[7] Although the PGOU was appointed as of July 19, 2003 "to be the responsible body and organization for the continuation of the actions aimed at protecting the material interests of the State in the matters regarding . . . repatriating to Ukraine the assets of Kiritchenko P.M. and Lazarenko P.I.," (*see* Thomson Decl., filed Jan. 20, 2006, Exs. 20-21), there is no suggestion in the appointment documents that such appointment retroactively validated any actions taken by the PGOU prior to that date.

court as discovery of new facts because the [PGOU] is a state body obligated, *inter alia,* to protect the interests of the State and act on the State's behalf where so determined by law." (*See id.* at 2.) The Pechersk court held that the PGOU had "failed to demonstrate to the court any essential facts that were not and could not be known to the court and are material to the case and that the [PGOU]'s petition must therefore be declined." (*See id.* at 2.) Although the Pechersk court noted the PGOU's argument that UTI was not given notice of the suit, it did not address the issue. (*See id.* at 1.)

On March 25, 2004, the PGOU appealed. (*See* Clements Decl. Ex. T.) On May 7, 2004, the appellate court denied the appeal. (*See* Romanova Decl. Ex. D.) The appellate court noted that it had previously affirmed the Pechersk court's March 4, 2003 decision and that the PGOU had not appealed the appellate court's ruling. (*See id.* at 2.) The court further held that the Pechersk court had made a "correct and justified conclusion" that the July 19, 2003 approval of the Cabinet of Ministers "could not be accepted by the court as a newly discovered fact," and that "the fact that the court had sent notifications to the third party to an incorrect address was also inessential and immaterial to the case." (*See id.* at 3.)

On June 4, 2004, the PGOU filed an appeal with the Supreme Court of Ukraine. (*See* Clements Decl. Ex. V.) On June 10, 2004, according to the Supreme Court, the Pechersk court held that the appeal would be "left without action due to the inconsistency of

both its form and content with the requirements of civil process laws" and ordered the flaws to be corrected by June 20, 2004. (*See* Romanova Decl. Ex. E at 1.)[8] When the PGOU failed to correct the flaws in the execution of its appeal, the Pechersk court, in a judgment issued June 24, 2004, deemed the appeal unfiled and returned it to the PGOU. (*See id.* at 2.) The appellate court affirmed that decision on October 5, 2004. (*See id.*) The PGOU thereafter appealed the June 24, 2004 and October 5, 2004 rulings to the Supreme Court, which denied the appeal in a decision dated February 3, 2005.[9] (*See id.*)

B. Lazarenko Ukrainian Lawsuit

Lazarenko filed a separate lawsuit against the PGOU in the Pechersk court, likewise seeking to invalidate the PGOU's power of attorney and assignment to UTI. The case was not assigned to the same judge who heard Kiritchenko's case. On September 3, 2003, the Pechersk court issued a written decision in

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[8] The above quotation is from the February 3, 2005 opinion of the Supreme Court of Ukraine.

[9] Contrary to Kiritchenko's assertion, it does not appear that the Supreme Court of Ukraine ruled on the merits of the PGOU's appeal, but rather ruled only that the lower courts did not err in finding the PGOU's appeal on the merits to be improperly filed. Nonetheless, the Supreme Court did not purport to alter the appellate court's opinion affirming the trial court's conclusions that the PGOU lacks authority to assign claims of Ukraine and that Kiritchenko's lawsuit was untimely.

Lazarenko's favor.[10] (*See* Clements Decl. Ex. X.)[11] The Pechersk court held that "neither a public prosecutor's office nor any public prosecutors have any legal grounds to issue a power of attorney to anyone, including the foreign firm UTICo, since they do not act as a party to the legal proceedings or have any personal interest therein or claims thereunder – which proves that neither the power of attorney nor any acts performed by said firm as attorney in fact under the power of attorney conform with the law." (*See id.* at 2.) The Pechersk court further found the PGOU "had no grounds to grant a power of attorney to a foreign firm in the conduct of proceedings with respect to Respondent P.I. Lazarenko, to say nothing about the right of reassignment, and it is for this reason that UTICo was entitled [to] act neither on behalf of the Ukraine nor on behalf of the [PGOU]." (*See id.* at 3.) The Pechersk court additionally held that the PGOU "has no right under applicable Ukrainian laws to delegate any representation functions for protecting

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[10] The court noted that "third party" UTI had not appeared, "even though notice has been duly given of the time and place of the proceedings." (*See id.* at 1.) The court concluded that "the case could be examined in absence of the third party representative based on the existing evidence on file as provided by Article 172 of the Ukrainian Civil Procedure Code." (*See id.*)

[11] Each of the Ukrainian court decisions issued in the Lazarenko matter has been authenticated pursuant to the requirements of Rule 44(a)(2) of the Federal Rules of Civil Procedure and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. (*See* Logosha Decl., filed June 2, 2006, ¶¶ 3-5 and Exs. A-E.)

the interests of the state to any other body." (*See id.* at 3.) Finally, the Pechersk court invalidated both the power of attorney and the PGOU's assignment to UTI. (*See id.* at 5.)

The PGOU appealed, and the civil division of the appellate court of Kiev, in an opinion issued November 27, 2003, reversed, finding that the Pechersk court's conclusions "involved a gross violation of the rules of both material and process law." (*See id.* Ex. Y at 2.) The appellate court held that the Pechersk court, having concluded that the PGOU had violated Lazarenko's rights by making an unlawful assignment to UTI, erred by failing "to clarify the nature of legal relations and legal grounds for the claims so made as required by Article 137 of the Ukrainian Civil Process Code." (*See id.* at 3.) The appellate court further held that the Pechersk court erred by failing "to make provisions for bringing to trial the UTICo firm as co-defendants." (*See id.* at 4.) The appellate court remanded the action to the trial court for further proceedings.

Lazarenko appealed to the Supreme Court of Ukraine. In an opinion dated March 17, 2005, the Supreme Court reversed the appellate court, holding that the decision of the appellate court was "based on an incorrect application of the norms of procedural law." (*See id.* Ex. AA at 3.) With respect to the appellate court's ruling on the merits of the appeal, the Supreme Court held that, pursuant to rules of Ukrainian civil procedure, the appellate court should have decided the case "on its merits rather than

ordering a retrial by the original trial court," and remanded the case to the appellate court. (*See id.* at 4.) With respect to the appellate court's holding that the Pechersk court erred by not bringing UTI to trial as a co-defendant, the Supreme Court also reversed, noting that the Pechersk court had properly named UTI as a third party in accordance with Ukrainian rules of civil procedure. (*See id.*)

On July 7, 2005, the appellate court issued a decision affirming the Pechersk court's original decision invalidating the assignment.[12] (*See id.* Ex. BB.) The appellate court held that, under Ukrainian law, "offices of public prosecutors and prosecutors, not being a party of a case and not having personal interests or claims, do not have legal grounds for issuing powers of attorneys to any party[.]" (*See id.* at 4.) Additionally, under Ukrainian law, the assignment is invalid because "only the owner of the property has

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[12] A handwritten copy of the decision submitted to this Court appears to be missing text on the right side, as a result of the copying process; a similar copy appears to have been submitted to the translator, as the translation submitted to the Court contains question marks and notations that text has been "cut off" and that text is "missing." (*See id.*) Nevertheless, the translator was able to translate the bulk of the opinion, and the ruling is clear. Although defendants later submitted an authenticated printed version of the opinion, and an English translation thereof, the Court has not considered such translation because defendants did not submit a declaration from the translator with respect thereto. The Court notes, however, that such translation is consistent with the translation of the handwritten copy.

the right to dispose of it," and the PGOU is not "the owner of the property" at issue in the assignment and does not have "direct rights and powers regarding disposal of the property." (*See id.* at 5.) The appellate court denied the PGOU's appeal and left "the Decision of Pechersk District Court of City of Kyiv of September 3, 2003 without changes." (*See id.* at 6.)

On August 5, 2005, the PGOU appealed the appellate court's decision to the Supreme Court of Ukraine. (*See* Clements Decl. Ex. CC.) To date, the Supreme Court of Ukraine has not taken action on the appeal.[13]

LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment as to "all or any part" of a claim "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(b), (c). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby,*

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[13] Although the July 8, 2005 appellate court decision has been appealed to the Supreme Court of Ukraine, it "has full legal force and effect" under Ukrainian law unless and until the Supreme Court "revoke[s] the legal force and effect of the Court of Appeal ruling." (*See* Clements Decl. Ex. FF (Ryabenko Decl.) ¶ 10.)

Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* The Court may not weigh the evidence. *See id.* at 255. Rather, the nonmoving party's evidence must be believed and "all justifiable inferences must be drawn in [the nonmovant's] favor." *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc) (citing *Liberty Lobby*, 477 U.S. at 255).

The moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatory answers, admissions and affidavits, if any, that it contends demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party's burden is discharged when it shows the court there is an absence of evidence to support the nonmoving party's case. *See id.* at 325.

Where the moving party "bears the burden of proof at trial, he must come forward with evidence which would entitle him to a directed verdict if the evidence went uncontroverted at trial," and "establish the absence of a genuine issue of fact on each issue material to his [claim]." *See Houghton v. South*, 965 F.2d 1532, 1536-37 (9th Cir. 1992) (citations omitted).

A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *See* Fed. R. Civ. P. 56(e); *see also Liberty Lobby,* 477 U.S. at 250. The opposing party need not show the issue will be resolved conclusively in its favor. *See Liberty Lobby,* 477 U.S. at 248-49. All that is necessary is submission of sufficient evidence to create a material factual dispute, thereby requiring a jury or judge to resolve the parties' differing versions at trial. *See id.*

The district court is not required to search the record *sua sponte* for some genuine issue of material fact. *See Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996) ("It is not our task, or that of the district court to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment."); *see also Carmen v. San Francisco Unified School District,* 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found.").

DISCUSSION

As an initial matter, the Court has before it three motions by UTI to supplement the record with

additional evidence. Although, as Kiritchenko points out, much of the evidence UTI seeks to submit is inadmissible hearsay, without foundation, repetitious, or irrelevant to the issue of the validity of the assignment, the Court nonetheless will GRANT the motions to supplement the record, and will consider below the new evidence to the extent it is both admissible and relevant.

The Court next turns to the merits of defendants' motion. Defendants move for summary judgment on the ground that UTI lacks standing to assert any claims belonging to Ukraine. Rule 17(a) of the Federal Rules of Civil Procedure provides that "[e]very action shall be prosecuted in the name of the real party in interest." *See* Fed. R. Civ. P. 17(a). If a claim has been assigned, the assignee becomes the real-party-in-interest and can maintain suit in its own name. *See Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1282 (9th Cir. 1983). The burden of proving the validity of an assignment lies with the purported assignee. *See Britton v. Co-op Banking Group*, 4 F.3d 742, 746 (9th Cir. 1993).

A. Timing of Assignment

Defendants argue that even if the August 11, 1999 assignment from the PGOU to UTI is valid, it does not operate to cure UTI's lack of standing to assert the instant action at the time the complaint was filed on June 24, 1999.

Assuming, *arguendo,* UTI lacked standing to assert its initial complaint, however, an amended complaint was filed October 8, 1999, after the assignment was executed. Where a plaintiff obtains an assignment after the filing of his initial complaint, and thereafter files a timely amended complaint, dismissal for lack of standing is not warranted.[14] *See, e.g., Kilbourn v. Western Surety Co.,* 187 F.2d 567, 571 (10th Cir. 1951) (rejecting contention plaintiff's claim subject to summary judgment where plaintiff obtained assignment after filing initial complaint but before filing amended complaint).

Accordingly, defendants have not demonstrated that the execution of the assignment after the filing of the initial complaint entitles them to summary judgment.

B. Act of State Doctrine

UTI next argues that the act of state doctrine bars the Court from examining the legality of the PGOU's assignment to UTI.

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[14] Defendants do not argue that the statute of limitations expired on any claim during the three-and-one-half-month period between the date of the initial complaint and the date the amended complaint was filed. *See, e.g., United States ex. rel. Wulff v. CMA, Inc.,* 890 F.2d 1070, 1073-75 (9th Cir. 1989) (affirming summary judgment in favor of defendants where statute of limitations ran after initial complaint filed but before plaintiffs obtained assignment).

"The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1964); *see also Underhill v. Hernandez,* 168 U.S. 250, 252 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."). The doctrine "has its roots, not in the Constitution, but in the notion of comity between independent sovereigns," as well as "judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties." *See First National City Bank v. Banco National de Cuba,* 406 U.S. 759, 765 (1972). "[T]he act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government." *Id.* at 765. "The doctrine, today, is a flexible one designed to prevent judicial pronouncements on the legality of the acts of foreign states which could embarrass the Executive Branch in the conduct of foreign affairs." *Liu v. Republic of China,* 892 F.2d 1419, 1432 (9th Cir. 1989). "The 'touchstone' or 'crucial element' is the potential for interference with our foreign relations." *Id.*

Thus, the doctrine does not apply where, for example, the executive branch "expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy," *see First National City Bank v. Banco National de Cuba,* 406 U.S. at 768, or where the foreign government concedes the unlawfulness of the act in question, *see Republic of the Philippines v. Marcos,* 862 F.2d 1355, 1360 (9th Cir. 1988) (en banc) (holding act of state doctrine "is not a promise to the ruler of any foreign country that his conduct, if challenged by his own country after his fall, may not become the subject of scrutiny in our courts").

Here, the assignment at issue has been declared invalid by the Ukrainian courts. As the Ukrainian government, by its courts, has invalidated the very assignment at issue, the Court is not barred by the act of state doctrine from examining the validity of said assignment for purposes of determining whether UTI has standing to assert the instant action. *See, e.g., id.* at 1360.

Moreover, as defendants point out, the act of state doctrine has no application here because the act of state in question cannot be considered to have been committed entirely in Ukraine. The assignment was given by the PGOU to UTI, a Massachusetts corporation, for the express purpose of filing suit on Ukraine's behalf in the United States courts. (*See* Clement Decl. Ex. A.) As noted, the act of state doctrine only precludes inquiry into acts of a foreign government committed within its own territory. *See*

Sabbatino, 376 U.S. at 401; *see also Underhill*, 168 U.S. at 252. The act of state doctrine ordinarily does not preclude judicial review of the extraterritorial effects of acts of state. *See, e.g., Liu*, 892 F.2d at 1433 (finding act of state doctrine not applicable to state-ordered murder planned in foreign country and carried out in California); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972) (finding act of state doctrine did not bar former owners of Cuban corporation confiscated by Cuban government from suing third party in United States to preserve right to use United States trademark registered in name of confiscated corporation; declining to give "'extra-territorial effect' to a confiscatory decree of a foreign state"); *Tabacalera Severiano Jorge v. Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir. 1968) (finding act of state doctrine did not bar former owners of Cuban corporation confiscated by Cuban government from suing Florida corporation for money owed prior to confiscation; holding "acts are to be recognized under the Act of State Doctrine only insofar as they were able to come to complete fruition within the dominion of the Cuban government"); *Republic of Iraq v. First National Bank*, 353 F.2d 47, 51 (2nd Cir. 1965) (finding act of state doctrine did not bar judicial review of Iraqi confiscation of assets located in United States; noting, "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state only if they are consistent with the policy and law of the United States.") (internal quotation and citation omitted); *but see In re*

Philippine National Bank, 397 F.3d at 773 (finding "extraordinary circumstances" requiring application of act of state doctrine to preclude district court's interference with Philippine Supreme Court order requiring transfer of assets from Singapore to Republic of Philippines). Here, because the assignment at issue was purportedly made for the express purpose of permitting UTI to file suit in United States courts to recover assets located in the United States, the Court finds the act in question was not committed entirely within Ukraine, and, accordingly, the act of state doctrine does not bar this Court from reviewing the validity of said assignment.

For the reasons set forth above, the Court finds the act of state doctrine does not bar the Court from examining the legality of the PGOU's assignment to UTI.

C. Fugitive Disentitlement Doctrine

UTI argues that Kiritchenko and Lazarenko are fugitives from justice with respect to various Ukrainian criminal charges and, consequently, are barred by the fugitive disentitlement doctrine from seeking enforcement of the Ukrainian judgments in this Court. Assuming, *arguendo,* that Kiritchenko and Lazarenko are fugitives with respect to criminal charges in Ukraine, however, the fugitive disentitlement doctrine, for the reasons set forth below, does not bar them from seeking to enforce the Ukrainian judgments in this Court.

The fugitive disentitlement doctrine authorizes a court to "dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive" during the pendency of his appeal. *See Degen v. United States,* 517 U.S. 820, 823 (1996); *Ortega-Rodriguez v. United States,* 507 U.S. 234, 239 (1993). The purposes of the doctrine are "to avoid making decisions that could not be enforced, to deter flight, to assure an effective adversary process, and to serve the interest in efficient, dignified appellate practice." *See United States v. Gonzalez,* 300 F.3d 1048, 1051 (9th Cir. 2002) (internal quotation and citation omitted).

Here, neither Kiritchenko nor Lazarenko is seeking relief with respect to the criminal matters in Ukraine from which they are alleged to have become fugitives. As the Second Circuit has noted, there are no cases "in which the doctrine was applied by a court of the jurisdiction to which, rather than from which, the alleged fugitive had fled." *See Bano v. Union Carbide Corp.,* 273 F.3d 120, 125 (2nd Cir. 2001). As the Second Circuit explained:

> That is not surprising. Because the purpose of the doctrine is to allow courts to protect their proceedings and judgments, a court will ordinarily employ it only to ensure the enforceability of *its* decisions; to discourage flouting *its* process; to discourage flights from *its* administration of justice; or to avoid prejudice to the other side affecting litigation that is or may be before *it*.

Id. at 125-26 (emphases in original). The doctrine applies only where there is "some connection between a defendant's fugitive status and his appeal." *See Ortega-Rodriguez,* 507 U.S. at 249. In *Bano,* for example, the Second Circuit found the fugitive disentitlement doctrine inapplicable to district court proceedings wherein the defendants were fugitives from court proceedings in India, holding "[i]t is the courts of India . . . , not the United States District Court for the Southern District of New York, that would have the authority . . . to defend their own dignity by sanctioning the defendants' alleged acts of defiance, which occurred solely within their domain." *See Bano,* 273 F.3d at 127.

Similarly, in the instant action, because Kiritchenko and Lazarenko are alleged to be fugitives from Ukraine, the fugitive disentitlement doctrine does not preclude them from seeking enforcement of Ukrainian judgments in this Court.

D. Enforcement of Ukrainian Judgments Against UTI

As discussed above, the Ukrainian courts, in two different lawsuits, have found the PGOU's assignment to UTI invalid on the ground the PGOU lacks authority under Ukrainian law to assign any claims held by the state of Ukraine to anyone. (*See* Romanova Decl. Exs. A, B; Clements Decl. Exs. X, BB.) UTI argues the Ukrainian court decisions cannot be enforced against UTI.

1. Standard for Recognition of Foreign Judgments

Federal jurisdiction over the instant action is based on both diversity and the existence of a federal question. (*See* SAC ¶¶ 27-28.) As set forth below, the same standard applies to recognition of foreign judgments irrespective of whether jurisdiction is based on diversity or a federal question.

"There is currently no federal statute governing recognition of foreign judgments in the federal courts." *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme,* 433 F.3d 1199, 1212 (9th Cir. 2006) (en banc) (opinion of Fletcher, J.). "In diversity cases, enforceability of judgments of courts of other countries is generally governed by the law of the state in which enforcement is sought." *Id.* at 1213.[15] Although UTI contends the enforceability of the Ukrainian judgments is determined by California's Uniform Foreign Money-Judgments Recognition Act, that Act applies only to a "'judgment of a foreign state

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[15] Although the cited section of Judge Fletcher's opinion is joined by only two other judges on the en banc panel, the opinion authored by Judge Fisher concurring in part and dissenting in part is in agreement with Judge Fletcher that, in a diversity action, the enforcement of a foreign judgment is a question of the law of the state in which enforcement is sought. *See id.* at 1239 n.4 (Fisher, J., concurring in part and dissenting in part.) Because Judge Fletcher's opinion on this issue is joined by two other judges, and Judge Fisher's opinion is joined by four other judges, a majority decision of the en banc panel exists on this issue.

granting or denying recovery of a sum of money.'" *See id.* (quoting Cal. Code Civ. Proc. § 1713.1(2)). As discussed above, the Ukrainian courts did not award damages, but rather, addressed the issue of whether the PGOU validly assigned Ukraine's claims to UTI. Thus, the Uniform Foreign Money-Judgments Recognition Act has no application; rather, the Court must "look to general principles of comity followed by the California courts" as embodied in the Restatement of the Foreign Relations Law of the United States. *See id.* at 1213. Likewise, in federal question cases, courts look to the Restatement of the Foreign Relations Law of the United States. *See Bank Melli Iran v. Pahlavi,* 58 F.3d 1406, 1410 (9th Cir. 1995) (citing *Hilton v. Guyot,* 159 U.S. 113, 205-06 (1895) and Restatement (Third) of the Foreign Relations Law of the United States § 482) (noting "[i]t has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with due process").

Section 482 of the Restatement (Third) of the Foreign Relations Law of the United States sets forth the circumstances under which a United States court shall not recognize a foreign judgment, and the circumstances under which such a court need not recognize a foreign judgment. "A court in the United States may not recognize a judgment of the court of a foreign state if "(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or (b) the court that rendered the judgment

did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421."[16] *See* Restatement (Third) of the Foreign Relations Law of the United States § 482(1). A court "need not" recognize a foreign judgment if, *inter alia*, "the defendant did not receive notice of the proceedings in sufficient time to enable him to defend," or "the judgment was obtained by fraud," or "the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought." *See id.* § 482(2)(b), (c), (d).

2. Lack of Due Process

Although UTI asserts numerous grounds in support of its argument that the Ukrainian courts' decisions cannot be enforced against UTI, the Court need not address all of them; the Court agrees with UTI that the Ukrainian court decisions are not enforceable against UTI consistent with due process because service of process was never effected upon UTI in the Ukrainian actions. Roman A. Plyamovaty, a member of UTI's board of directors, attests that UTI "has never been served with any summons or pleadings from Ukrainian courts, under the Hague

[16] Section 421 sets forth various factors to be considered in determining whether "the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable." *See id.* § 421.

Convention or otherwise,"[17] (*see* Plyamovaty Decl., filed Jan. 20, 2006, ¶ 3), and there is no evidence to the contrary.

Defendants do not argue that UTI was served in the Ukrainian actions, but contend UTI eventually received informal notice of the actions. In support thereof, defendants submit UTI's declaration attesting to lack of service, dated December 2, 2003, and filed by the PGOU in the Kiritchenko Ukrainian litigation, thus arguably demonstrating UTI was at least aware of the Kiritchenko Ukrainian litigation before that litigation concluded. (*See* Clements Decl. Ex. R.)

A "due process 'principle of general application in Anglo-American jurisprudence,'" however, is that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). Consistent therewith, the Courts of Appeals have held, with respect to foreign litigation, that any judgment entered in such foreign litigation cannot be enforced in United States courts against any party not properly served therein. *See Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146, 161-62 (2d Cir. 2005) (internal quotation and citation omitted) (holding Russian default judgment could not be given

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[17] Ukraine, like the United States, is a party to the Hague Convention.

preclusive effect by United States court without affording defendant opportunity to challenge in United States action whether such defendant was properly served in Russian action); *Koster v. Automark Industries, Inc.*, 640 F.2d 77, 81 n.3 (7th Cir. 1981) (holding Dutch default judgment not enforceable in United States courts because service on defendant pursuant to Dutch law failed to "comport with American due process requirements"); *see also Arco Electronics Control Ltd. v. Core Int'l*, 794 F. Supp. 1144, 1146 (S.D. Fla. 1992) (refusing to enforce Israeli judgment against Florida corporation where Florida corporation was not served in Israeli litigation pursuant to requirements of Hague Convention); *Mata v. American Life Ins. Co.*, 771 F. Supp. 1375, 1390 (D. Del. 1991) (refusing to recognize Bolivian judgment where purported service on defendant failed to "comport with United States notions of constitutional due process"). Accordingly, this Court finds any informal notice UTI received with respect to the Ukrainian litigation does not suffice for purposes of compliance with due process.

In sum, because there is no evidence UTI was ever served in the Ukrainian actions, the Court finds the Ukrainian courts' decisions are not enforceable against UTI.[18]

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[18] In light of such ruling, the Court need not determine whether, pursuant to § 482(1), it cannot enforce the Ukrainian courts' decisions against UTI because the Ukrainian courts lacked jurisdiction over UTI, or whether, pursuant to § 482(2), it

(Continued on following page)

E. Ukrainian Judgments as Evidence of Foreign Law

Defendants argue that even if the Ukrainian judgments are not directly enforceable against UTI, the Court should defer to the Ukrainian judgments as evidence of Ukrainian law on the issue of the PGOU's authority to assign claims held by Ukraine.

1. Choice of Law

UTI argues that the Ukrainian judgments are irrelevant because the Court should apply California law, not Ukrainian law, to determine the validity of the assignment from the PGOU to UTI.

Where, as here, jurisdiction is based on the existence of a federal question, (*see* SAC ¶ 28), "federal common law applies to the choice of law rule determination." *See Schoenberg v. Exportadora de Sal*, 930 F.2d 777, 782 (9th Cir. 1991). Federal common law "follows the approach of the Restatement (Second) of Conflict of Laws[.]" *See id.* As defendants point out, the validity of an assignment is "determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the assignment and the parties." *See* Restatement

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"need not" enforce such decisions on the grounds that UTI failed to receive notice of the proceedings in sufficient time to defend or that the judgment is repugnant to the public policy of the United States or California.

(Second) of Conflicts of Laws § 209.[19] The comments to § 209 expressly state that § 209 applies to the issue of "the capacity of the assignor to make an effective assignment." *See id.* cmt. a. Ukraine unquestionably has the most significant relationship, both to the assignment and the parties, with respect to the issue of whether the PGOU has the capacity to assign claims held by Ukraine. California and the United States have no interest in determining the scope of authority of Ukrainian prosecutors, or the circumstances under which the government of Ukraine may assign its claims to others.

As noted, UTI also relies on diversity as a basis for jurisdiction over the instant action. (*See* SAC ¶ 27.) "A district court in a diversity case must apply the same choice of law analysis that would be applied by state courts in the jurisdiction in which the district court is situated." *See Liew v. Official Receiver and Liquidator (Hong Kong)*, 685 F.2d 1192, 1195 (9th Cir. 1982) (citing *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941)). In *Liew*, in determining the validity of an assignment, the Ninth Circuit applied California's "governmental interest" analysis. *See id.* Under such analysis, where there is

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[19] Although § 209 refers to the assignment of contractual rights, the Restatement's introductory note to the topic states § 209 "probabl[y]" is "also applicable to assignments of rights of action in tort." *See* Restatement (Second) Conflicts of Law, introductory note to Chapter 8, Topic 2, "Assignment of Contractual Rights." The Court is aware of no authority to the contrary.

a conflict between the laws of two jurisdictions, but only one of the jurisdictions has an interest in having its laws applied to the issue in question, the court applies the law of that jurisdiction. *See id.* at 1196. Here, as noted, only Ukraine has an interest in determining the scope of authority of Ukrainian prosecutors, or the circumstances under which the government of Ukraine may assign its claims to others.[20]

Thus, regardless of whether the Court applies federal or California choice of law rules, the Court must apply Ukrainian law to determine the validity of the assignment from the PGOU to UTI.

2. Determination of Foreign Law; Ukrainian Court Decisions As Evidence Thereof

Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, a district court, "in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *See* Fed. R. Civ. P. 44.1. In particular,

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[20] UTI argues that, under California choice of law rules, questions affecting the title to real property are to be determined by the law of the jurisdiction in which the property is located. (*See* Opp. at 18 (citing *Cummings v. Bullock*, 367 F.3d 182, 183 (9th Cir. 1966).) Although plaintiff, in the instant action, seeks title to certain real property located in California, the threshold issue here is the validity of the assignment to UTI, not a question concerning the title to real property.

courts may rely on foreign case law. *See Pazcoguin v. Radcliffe,* 292 F.3d at 1214 (discussing Philippine case law in determining issue of Philippine law).

The determination of foreign law is a question of law. *See Pazcoguin v. Radcliffe,* 292 F.3d 1209, 1216 (9th Cir. 2002); *see also* Fed. R. Civ. P. 44.1 ("The court's determination [of foreign law] shall be treated as a ruling on a question of law."). "Even differences of opinion on the content, applicability, or interpretation of the foreign provision may not be characterized as a 'genuine issue as to any material fact' under Rule 56." *Banco de Credito Industrial, S.A. v. Tesoreria General de la Seguridad Social de Espana,* 990 F.2d 827, 838 (5th Cir. 1993) (internal quotation and citation omitted).

As discussed above, the Ukrainian courts, in two different lawsuits, have found the PGOU's assignment to UTI invalid on the ground the PGOU lacks authority under Ukrainian law to assign the claims of Ukraine to anyone. (*See* Romanova Decl. Exs. A, B; Clements Decl. Exs. X, BB.) Defendants offer the above-referenced Ukrainian court decisions "under Rule 44.1 as a statement of the law of Ukraine regarding the validity of the assignment." (*See* Reply at 7-8.)

UTI argues that, pursuant to Comment "i" to § 482 of the Restatement (Third) of Foreign Relations Law, the Ukrainian opinions are not admissible as evidence for any purpose. Comment "i" provides:

> If a foreign judgment is refused recognition on grounds of unfairness of the judicial system, unfair procedures, fraud, or lack of jurisdiction, it may not be admitted for any purpose in the United States. Judgments refused recognition on other grounds – for instance, under Subsection 2(d), (e), or (f),[21] or because of lack of reciprocity, . . . – may be admitted as evidence of the matters litigated or determined, but will not be binding on the court or preclude the opposing party from introducing contrary evidence.

See Restatement (Third) of Foreign Relations Law § 482, cmt. i.[22]

a. Asserted Lack of Impartial Judicial System/Unfair Procedures

UTI argues, relying in large part on United States Department of State Country Reports on Human Rights Practices ("Country Reports") for

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[21] Pursuant to §§ 2(d), (e), and (f), a court "need not recognize a judgment of the court of a foreign state if . . . (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought; (e) the judgment conflicts with another final judgment that is entitled to recognition; or (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum." *See* Restatement (Third) of Foreign Relations Law § 482(2)(d), (e), (f).

[22] The parties have cited no case law interpreting comment "i," and this Court has located none.

Ukraine, that the Court should not consider the Ukrainian judgments because Ukrainian courts are not impartial tribunals and do not provide procedures compatible with due process of law.

The Country Reports, while recognizing that the Constitution of Ukraine provides for an independent judiciary, nonetheless express some concern about past incidents of corruption in the Ukrainian court system. (*See, e.g.*, Country Reports on Human Rights Practices, Ukraine, 2002 § 1(e);[23] Country Reports on Human Rights Practices, Ukraine, 2003 § 1(e);[24] Country Reports on Human Rights Practices, Ukraine, 2004 § 1(e);[25] Country Reports on Human Rights Practices, Ukraine, 2005 § 1(e)[26].) The Country Reports also include positive statements about Ukrainian courts, however, suggesting that the Ukrainian judicial system has been improving. For example, the 2004 Country Report for Ukraine notes that "the Supreme Court continued to show increasing independence

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[23] The 2002 Country Report on Human Rights Practices, Ukraine, is available at http://www.state.gov/g/drl/rls/hrrpt/2002/18398.htm.

[24] The 2003 Country Report on Human Rights Practices, Ukraine, is available at http://www.state.gov/g/drl/rls/hrrpt/2003/27871.htm.

[25] The 2004 Country Report on Human Rights Practices, Ukraine, is available at http://www.state.gov/g/drl/rls/hrrpt/2004/41715.htm.

[26] The 2005 Country Report on Human Rights Practices, Ukraine, is available at http://www.state.gov/g/drl/rls/hrrpt/2005/61682.htm.

during the course of the year"; that the "Constitution includes procedural provisions intended to ensure a fair trial," although remnants of a "Soviet era criminal justice system" limited those rights pending enactment of additional legislation; that Ukrainian law "provides for broad use of juries," albeit, to date, juries had been used in only a limited number of cases; and that a new Judicial Academy "trains new judges and continues the education of sitting judges . . . [and] graduated its first groups of judges in April 2003." (*See* Country Reports on Human Rights Practices, Ukraine, 2004 § 1(e).) The 2005 Country Report observes that although the head of the Ukraine Supreme Court had stated that, during the previous administration, he had received calls from senior administration officials and had been given instructions how to rule in specific cases, he had received "no such calls under the [current] Yuschenko administration." (*See* Country Reports on Human Rights Practices, Ukraine, 2005 § 1(e).) Moreover, "[i]n contrast to 2004, there were no credible reports that the government sought to dismiss politically unsympathetic judges," and "[h]uman rights groups, the media, and legal watchdog organizations noted that the court continued to show independence during the course of the year." (*See id.*)

Likewise, although a 2004 report from the United States Department of State titled, "Doing Business in Ukraine: A Country Commercial Guide for U.S. Companies" ("Commercial Guide"), (*see* Motion to Supplement Record, filed June 16, 2006, Ex. 2), also relied

on by UTI, notes that "[m]ost U.S. businesses consider the local and national court systems unpredictable and try to avoid them," (*see id.* at 117), the Commercial Guide also states that a 2003 law created "an independent judicial department to manage the court system," which "increases the independence of the judiciary," (*see id.* at 117), and further notes "an encouraging trend toward conforming Ukraine's legal system to international norms." (*See id.*)

Here, the court decisions in the Kiritchenko Ukrainian litigation were issued in 2003, 2004, and 2005; the decisions in the Lazarenko Ukrainian litigation were issued in 2003 and 2005. Although the trial court decisions in each action were issued in 2003, the most recent appellate decisions in each action were issued in 2005, by which time the Ukrainian court system had made substantial progress, and found no error in the trial court decisions. Moreover, the issue decided by the Ukrainian courts – whether the PGOU has authority to assign claims to UTI, or, indeed, to anyone – is, in essence, a question of law; consequently, any deficiencies at the time the earlier proceedings were conducted are unlikely to have had any impact on the independent legal analysis thereafter conducted by the higher courts. Finally, as discussed further below, the legal analyses set forth in the Ukrainian court decisions are consistent with each other and are based on the same constitutional provisions and statutes identified by the parties' experts herein as relevant, thus suggesting that any deficiencies in the Ukrainian court system did not

impact the legal reasoning in the actions at issue herein.

Accordingly, the Court finds UTI has not demonstrated that the Ukrainian courts are so lacking in impartiality, due process, or procedural fairness that the United States courts should disregard all Ukrainian court decisions as a matter of course, or the particular decisions at issue herein. *See, e.g., In the Matter of the Arbitration Between Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine,* 311 F.3d 488, 499 (2d Cir. 2002) (rejecting argument that asserted corruption rendered Ukraine inadequate "alternate forum" for purposes of forum non conveniens analysis; finding no showing that Ukraine "is characterized by a complete absence of due process or an inability of the forum to provide substantial justice to the parties").

b. Asserted Fraud

UTI further argues that the Court should not consider the Ukrainian judgments because they were obtained by fraud. UTI contends that various asserted irregularities in the manner in which the Kiritchenko and Lazarenko Ukrainian actions were conducted are evidence of fraud.[27] Assuming, *arguendo*,

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[27] In particular, with respect to the Kiritchenko Ukrainian litigation, UTI argues that (1) the March 4, 2003 judgment of the Pechersk court was issued only 19 days after the case was filed; (2) the Ukrainian judge mailed a summons to UTI only six

(Continued on following page)

the existence of any such irregularities, however, the Court, having reviewed the evidence upon which UTI relies, and for the reasons set forth by defendants, finds UTI has failed to raise a triable issue that any such irregularities are the result of fraud. Moreover, UTI has submitted no evidence that any such irregularities resulted in any failure by the Ukrainian courts to reasonably apply the relevant law to what are essentially the undisputed relevant facts. UTI has submitted no evidence that the analyses in which the Ukrainian courts engaged are at odds with Ukrainian law.

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days before the March 4, 2003 judgment; (3) the March 4, 2003 hearing, which led to issuance of the March 4, 2003 judgment, was conducted within two hours, without witnesses or experts, and generated no transcripts; (4) the March 4, 2003 judgment included dicta; (5) the May 29, 2003 appellate hearing took only ten minutes; (6) Kiritchenko initially produced, in the instant litigation, an illegible copy of a receipt purporting to indicate an attempt to serve UTI in the Kiritchenko Ukrainian litigation; and (7) Kiritchenko submitted to the Ukrainian court an illegible copy of the August 11, 1999 assignment. With respect to the Lazarenko Ukrainian litigation, UTI argues that (1) the summons to UTI was sent to the wrong address only ten days before the September 3, 2003 hearing in the Pechersk court; (2) the September 3, 2003 judgment was unusually lengthy; (3) an unsigned copy of the September 3, 2003 opinion in the Lazarenko Ukrainian action was obtained by Kiritchenko; (4) the July 7, 2005 opinion is sloppily handwritten; and (5) Judge Strizhevska, the judge who issued the September 3, 2003 decision of the Pechersk court has been under investigation for tampering with judicial proceedings in other cases.

c. Failure to Serve UTI

UTI further argues that the Court should not consider the Ukrainian judgments for any purpose because UTI was not served in either of the Ukrainian actions. As discussed above, the Ukrainian judgments are not enforceable against UTI because UTI was never served in those actions. Nothing in § 482 of the Restatement (Third) of Foreign Relations Law, however, expressly precludes a foreign judgment, under such circumstances, from being considered as persuasive authority with respect to the determination of an issue of foreign law. The absence of any such discussion is not surprising; determination of foreign law is expressly governed by Rule 44.1 of the Federal Rules of Civil Procedure, which expressly permits district courts, in determining foreign law, to "consider any relevant material or source, . . . *whether or not* . . . *admissible* under the Federal Rules of Evidence." *See* Fed. R. Civ. P. 44.1 (emphasis added). Moreover, the Ukrainian actions were actively litigated by the PGOU, who, as UTI's purported assignor, was aligned in interest with UTI, and there is no contention that the Ukrainian courts lacked jurisdiction over the PGOU, let alone over the subject matter of the action.

Accordingly, the Court finds the lack of service on UTI does not preclude the Court from considering the Ukrainian courts' decisions with respect to the issue of the PGOU's authority to assign claims of Ukraine, and the Court will consider the Ukrainian courts' decisions as evidence of Ukrainian law, in addition to

the parties' other evidence of Ukrainian law relevant to such issue.

3. Analysis of Ukrainian Law

Defendants argue that the Constitution and laws of Ukraine grant the PGOU specific enumerated powers, and that the authority to assign claims on behalf of the state is not included therein.

As defendants observe, Article 19 of the Ukraine Constitution provides: "Bodies of state power . . . and their officials are obliged to act only on the grounds, within the limits of authority and in the manner envisaged by the Constitution and laws of Ukraine." (*See* Clements Decl. ¶ 6 and Ex. E.) The Commentary to Article 19 explains that such entities "must act exclusively within limits determined by laws and regulations," and that "[t]heir activities must be completely and accurately defined, controlled, and regulated to the maximum extent possible in order to prevent any acts which may be detrimental to the individual, the society or the state for any reasons whatsoever." (*See id.*)

Article 92, subsection 14, of the Ukraine Constitution further provides that "the organization and operation of the procuracy"[28] is "determined exclusively by the laws of Ukraine." (*See id.* ¶ 7 and Ex. F.)

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[28] The parties agree that references to the "procuracy" refer to the PGOU.

Article 121 of the Ukraine Constitution defines the authority of the PGOU, as follows:

> The Procuracy of Ukraine constitutes a unified system which is entrusted with:
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> (1) prosecution in court on behalf of the State;
>
> (2) representation of the interests of a citizen or of the State in court in cases determined by law;
>
> (3) supervision of the observance of laws by bodies that conduct detective and search activity, inquiry and pre-trial investigation;
>
> (4) supervision of the observance of laws in the execution of judicial decisions in criminal cases, and also in the application of other measures of coercion related to the restraint of personal liberty of citizens.

(*See id.* ¶ 8 and Ex. G.)

Ukraine's Code of Civil Procedure further defines the scope of the authority of the PGOU. In particular, Article 13 provides that "[t]he scope and limits of the public procurator's powers during the hearing of a case shall be defined by this Code." (*See id.* ¶ 10 and Ex. I.) Article 120 provides that "[a] public procurator shall be a participant in civil proceedings in the court . . . [and] shall exercise the rights specified in Article 99," (*see id.* ¶ 11 and Ex. J); Article 99 grants all individuals participating in a case the following rights:

> the right to review the case materials and make transcripts thereof; obtain copies of decisions, determinations, decrees, or any other documents related to the case; participate in court hearings; present evidence and participate in investigation of evidence; file petitions or exceptions; give oral or written explanations to the court; present his or her arguments, considerations, or objections; appeal any court decision or determination; and exercise any other procedural rights accorded thereto by law.

(*See id.* ¶ 12 and Ex. K.) Article 120 grants a public procurator the additional rights to:

> (1) Affirm or alter declarations made by him before the court in defense of the rights and lawful interests of individuals and the state or waive such declarations;
>
> (2) Submit cassation or separate appeals with regard to, respectively, the decision or ruling of the court of the first instance in cases or regarding matters in the hearing of which the procurator participated.

(*See id.* ¶ 11 and Ex. J.)[29] As defendants point out, none of the above-referenced provisions provide that

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[29] Additionally, the authority of the PGOU is further defined by statute and, in particular, by a 1991 law referred to as both the "Law of Ukraine 'On Procuracy'" and the "Law of Ukraine: On General Prosecutor's Office" (hereafter, "1991 law"). (*See id.* Ex. G (Commentary to Article 121; noting "[a]ctivities all procurators are regulated by the Law of Ukraine "On

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the PGOU is authorized to assign to third parties claims belonging to Ukraine.

Defendants submit a declaration from Aleksandr Romanovich Mikhailenko ("Mikhailenko"), professor and head of the Department of Procedural Law, Institute of Advocateship, at Taras Shevchenko National University of Kiev, dated March 7, 2000. Relying on Articles 19 and 121 of the Ukraine Constitution, Mikhailenko opines that the PGOU "may act only within the scope of authority and by such means as provided by the Constitution of Ukraine and Ukrainian laws." (*See* Clements Surreply Decl. Ex. A (Mikhailenko Decl.) ¶ 8.) Mikhailenko further opines, relying on Article 102 of the Ukraine Constitution, that an assignment of Ukraine's claims by the PGOU "to anyone, including a private foreign firm, for the

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Procuracy" dated November 5, 1991, as amended"); *see also* The Law of Ukraine: On General Prosecutor's Office, No. 1789-XII (1991) (Ukraine) (summary of statute provided by Ukrainian Parliament), *available at* http://zakon.rada.gov.ua/cgi.bin/laws/anot.cgi?nreg=1789-12&p=1181578107055724.) Although no party has submitted a copy of such statute, the Court notes that the above-referenced summary thereof provides that the PGOU "shall supervise observance and correct application of laws by the Cabinet of Ministers of Ukraine, ministries and departments, bodies of state and economic management and control, local councils, their executive bodies, military units, all legal entities and natural persons," and that the "[b]asic functions of the General Prosecutor's Office shall be support of state accusation in court and representation of interests of citizen or state in court in cases inscribed by law." *See id.* There is no suggestion therein that the PGOU has authority to assign to third parties claims belonging to Ukraine.

purpose of protecting the interests of Ukraine, is not based on law" and that "only the President of Ukraine as head of state may act on behalf of the state of Ukraine." (*See id.* ¶ 12; *see also* Pechota Decl. Ex. B (English translation of Ukraine Constitution) Art. 102 (providing, "The president of Ukraine is the head of state and acts in the name of the state."). Relying further on Article 121 and the 1991 law, Mikhailenko opines that "if the state of Ukraine has sustained material damage, the [PGOU] may indeed represent the state in court," but that no law authorizes the PGOU "to delegate any of its constitutional representative functions to uphold the interests of the state to any other authority." (*See* Clements Surreply Decl. Ex. A (Mikhailenko Decl.) ¶¶ 17, 24.) Mikhailenko further opines that the PGOU "may act to assign material claims on behalf of the state of Ukraine only to the extent provided by the Constitution or laws of Ukraine," and that "neither the Constitution of Ukraine nor any law of Ukraine provides for any officer of the [PGOU] to be vested with such powers." (*See* Clements Surreply Decl. Ex. A (Mikhailenko Decl.) ¶ 27(b).) Accordingly, Mikhailenko concludes, the PGOU has "no right to act in such manner." (*See id.*)

UTI relies on the declarations of Valery Ivanovich Kuznetsov ("Kuznetsov"), dated April 4, 2000; Viktor Fedorovich Pogorelko ("Pogorelko"), dated April 4, 2000; and Vratislav Pechota ("Pechota"), dated April 6, 2000. Kuznetsov is the Chairman of the Department of International Law at the Academy of

Diplomacy of the Ministry of Foreign Affairs of Russia. (*See* Kuznetsov Decl. at 4:11-13.) Kuznetsov attests he was asked to opine on the issue of whether the PGOU, "within the framework of investigating its criminal cases, has the right to enter into contractual relations with foreign legal entities and to contract them to locate, identify and assist in repatriation to Ukraine of assets illegally withdrawn from Ukraine." (*See* Kuznetsov Decl. at 5:25-6:3.) Relying on the language in Article 121 of the Ukraine Constitution providing that the PGOU "is entrusted with . . . representation of the interests . . . of the State in court in cases determined by law," Kuznetsov concludes that the PGOU "has the power to enter into contractual relations with foreign legal entities if the protection of rights and interests of citizens and of the State requires so." (*See* Kuznetsov Decl. at 7:2-5.) Kuznetsov offers no opinion, however, as to whether the PGOU has the authority to assign to third parties claims belonging to Ukraine.

Pogorelko is the Head of the Department of Constitutional Law and Local Self-Government at the V.M. Koretsky Institute of State and Law at the National Academy of Science of Ukraine. (*See* Pogorelko Decl. at 5:17-20.) Relying on Article 121, Pogorelko opines that the PGOU "has the entirety of the authority to represent the interests of the Ukrainian State in the judicial bodies." (*See id.* ¶ 1.) Pogorelko further opines that the PGOU has the authority to seek confiscation of the property of the accused in criminal cases and has "the power to take

corresponding decisions in regard to civil suits outside of Ukraine." (*See id.* ¶¶ 3-4.) Although, according to Pogorelko, the PGOU "is not yet prepared to effectively implement civil litigation functions in the civil courts outside of Ukraine," the PGOU, "by right, has the grounds to enter into the contractual relations with private legal entities who are specifically engaged in the location, determination and repatriation of assets." (*See id.* ¶ 6.) Pogorelko further attests that "[t]here exists no legislative act that would prohibit to the Prosecutor General's Office such contractual actions outside of Ukraine." (*See id.* ¶ 14.) Pogorelko cites no statute or law that expressly empowers the Prosecutor General to assign claims to third parties, however.

Pechota is a Senior Research Scholar and Adjunct Professor of Law (retired) at Columbia University School of Law and a member of the faculty of the Harriman Institute for the Study of Russia and Eastern Europe at Columbia University. (*See* Pechota Decl. ¶ 1.) Pechota attests that, under Ukrainian law, the PGOU "has been granted wide powers," some of which "are strictly defined, others are outlined in general terms, and still others are implied (that is, they follow from the express authority given to the [PGOU] though such powers are not manifested by explicit and direct definition." (*See id.* ¶ 10.) Pechota concedes that because the PGOU traditionally "was concerned with matters that arose in the context of Ukrainian domestic affairs," the 1991 law "contains only a passing reference to international aspects of

the [PGOU's] functions," and provides only that the PGOU "deals with matters arising from international treaties concluded by Ukraine and from the generally recognized rules of international law." (*See id.* ¶ 11 and n.4.) According to Pechota, the PGOU, in order to give substance to such "passing reference," issued, on December 25, 1995, "an instruction entitled 'On the Procedure of Interaction Between the Organs of the Ukrainian Procuracy and Institutions of Foreign Countries," which, Pechota attests, provides for involvement of the PGOU in matters such as "repatriation of stolen property and illegally appropriated objects and values" and "obtaining information regarding the movement of money in bank accounts and their arrest."[30] (*See id.*) Although Pechota attests that such "instruction" has the force of law, (*see id.* ¶ 11), Pechota does not contend that it authorizes the PGOU to assign claims of the Ukraine to third parties.

Pechota does state, however, that because Article 121 of the Ukraine Constitution entrusts the PGOU with representing the interests of the state in court proceedings, it is his "firm opinion" that the PGOU has the implied authority to assign claims. (*See id.* ¶¶ 7, 14.) In Pechota's opinion, it should be implied, from the PGOU's authority to pursue restoration of state property by means of cases brought outside

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[30] A copy of such document has not been provided to the Court and the internet link contained in Pechota's declaration is not functional.

Ukraine, that the PGOU "acts on behalf of the Ukrainian state and can do anything that the state under Ukrainian and international law could do." (*See id.* ¶ 16.) Pechota opines that "the absence of explicit provisions authorizing the [PGOU] to entrust particular acts to be undertaken abroad to private companies and/or to assign claims does not necessarily mean that the [PGOU] is prevented from exercising such options," and concludes that if the PGOU "interprets [its] authority to entrust [its] particular functions exercised abroad to private companies and/or to assign claims, . . . [it] has the power to take actions in the interest of the state which do not contradict express limitations of [its] authority." (*See id.* ¶ 16.)

As noted, Article 19 of the Ukrainian constitution requires state officials to "act only on the grounds, within the limits of authority and in the manner envisaged by the Constitution and laws of Ukraine." (*See* Clements Decl. ¶ 6 and Ex. E (Art. 19 and Commentary).) Such language is intended to be restrictive; "bodies of state power and bodies of local self-government and their officials must act exclusively within limits determined by laws and regulations." (*See id.*, Commentary.) "Their activities must be completely and accurately defined, controlled, and regulated to the maximum extent possible in order to prevent any acts which may be detrimental to the individual, the society or the state for any reason whatsoever." (*See id.*) Article 121, which expressly defines the authority of the PGOU, contains no

suggestion that the PGOU has the authority to assign claims belonging to Ukraine. (*See id.* ¶ 8 and Ex. G.) Although Article 121 and the 1991 law do provide that the PGOU may represent the State's interests in court, such circumscribed authority cannot be read to encompass an implied right to unilaterally assign its client's claims to a third party, and there is no evidence of any express authorization, whether statutory or otherwise, to do so. Having read and considered the applicable statutes, constitutional provisions, and expert opinions, the Court finds, even without consideration of the Ukrainian court decisions, that the PGOU lacked the authority to assign claims of Ukraine to UTI.

The Ukrainian court decisions are in accord with this Court's finding and provide further support therefor. The dispute between the parties' experts herein centers primarily on whether it is appropriate to imply, from various provisions in the Ukrainian Constitution and other law delineating the authority of the PGOU, a right in the PGOU to assign to third parties claims belonging to Ukraine.[31] The Ukrainian court decisions ultimately relied on many of the same provisions of law cited herein by the parties' various experts, and concluded that the PGOU has no such authority. (*See* Romanova Decl. Exs. A, B; Clements Decl. Exs. X, BB.)

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[31] All of the parties' expert declarations on the issue of Ukrainian law predate the Ukrainian court decisions at issue, and, accordingly, do not address the analyses set forth therein.

Specifically, the Pechersk court, in its March 4, 2003 decision in the Kiritchenko litigation, held, relying, *inter alia,* on Articles 19 and 121 and the 1991 law, that Ukrainian law does not provide "for transfer by public prosecutors of their authorities to other persons, entities, or corporations." (*See* Romanova Decl. Ex. A at 3.) The Pechersk court further held that because the PGOU has no personal interest in any claims belonging to Ukraine, it has no legal right "to entrust [UTI] with the right of representation of the material claims on behalf of Ukraine, moreover with the right to transfer the powers" and, therefore, UTI could "act neither on behalf of Ukraine, nor on behalf of the [PGOU]." (*See id.* at 2.) Likewise, the appellate court, in its May 29, 2003 opinion in the Kiritchenko litigation, held, relying on the same provisions of Ukrainian law, that the Pechersk court "correctly came to the conclusion that the indicated norms of the law were violated" by the PGOU's attempted assignment to UTI of claims belonging to Ukraine, and denied the PGOU's appeal. (*See id.* Ex. B at 3.)

Similarly, in the Lazarenko Ukrainian litigation, the Pechersk court, in its September 3, 2003 opinion, held, relying, *inter alia*, on Article 121 and the 1991 law, that the PGOU "had no grounds to grant a power of attorney to a foreign firm in the conduct of proceedings with respect to Respondent P.I. Lazarenko, to say nothing about the right of reassignment, and it is for this reason that UTICo was entitled to act neither on behalf of Ukraine nor on behalf of the

[PGOU]." (*See* Clements Decl. Ex. X at 3.) Consequently, the court held the purported assignment invalid. (*See id.* at 5.) Although the appellate court initially reversed the trial court on procedural grounds, that ruling was, in turn, reversed by the Supreme Court; on remand, the appellate court affirmed the decision of the Pechersk court. (*See* Clements Decl. Ex. BB at 5-6.)

In sum, the Court concludes that the PGOU's assignment to UTI is invalid under Ukrainian law, and, accordingly, that UTI lacks standing, based on such assignment, to bring the instant action.

F. Other Possible Bases for Standing

UTI argues that even if the August 11, 1999 assignment from the PGOU to UTI is invalid, other bases for UTI's standing to bring the instant action exist.

1. May 1998 Agreement and Other Powers of Attorney

UTI's chairman of the board, W. Scott Thompson ("Thompson"), attests that, in May 1998, UTI obtained a power of attorney from the PGOU, and reached "an agreement with Ukraine on a complex of assistance in recovery of assets . . . with a 12% interest, a 'finder's fee' and assistance in all related work on freezing assets towards their recovery." (*See* Thompson Decl. ¶¶ 12, 14.) In the power of attorney,

dated May 14, 1998, the PGOU authorized two of UTI's attorneys to represent the PGOU in "various legal matters outside of Ukraine." (*See id.* Ex. 5.) On the following date, May 15, 1998, the PGOU sent a letter to UTI stating that the PGOU "agreed that [UTI] will be attributed a commission of 12 (twelve) percent" on any "assets to be returned to Ukraine, in connection with the Power of Attorney of the Prosecutor General's Office of May 14, 1998." (*See id.* Ex. 4.) UTI additionally notes it has been granted a total of "about 12 Powers of Attorney" from the PGOU. (*See* Plyomavaty Aff., filed Jan. 5, 2007, ¶¶ 8, 28 and Exs. 4, 7, 10-11, 15-16.)

"The grant of a power of attorney . . . is not the equivalent of an assignment of ownership" and "does not enable the grantee to bring suit in his own name." *See Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17-18 (2nd Cir. 1997). Accordingly, the May 14, 1998 power of attorney, the May 15, 1998 letter granting UTI a contingency fee pursuant to the May 14, 1998 power of attorney, and any other powers of attorney granted to UTI do not constitute an assignment of ownership of Ukraine's claims sufficient to permit UTI to assert such claims in its own name.

2. UESU judgment

UTI also contends it has standing to bring the instant action as a judgment creditor; specifically, UTI presents evidence that, on July 7, 2005, it was

awarded an $18.3 million default judgment on its counterclaims against United Energy Systems of Ukraine ("UESU") in *UESU v. UTI*, Case No. 97CV12180EFH, in the United States District Court for the District of Massachusetts ("UESU judgment"). (*See* Thompson Decl. Ex. 27.) UTI asserts that UESU is "a major instrumentality of kickbacks of Lazarenko." (*See* Opp. at 3.)

The UESU judgment was entered on counterclaims asserted by UTI on its own behalf, however, arising out of a business dispute between UTI and UESU. (*See* Plaintiff's Request for Judicial Notice in Support of Plaintiff's Opposition to Defendants Kiritchenkos' Motion to Strike Registration of Judgment from Another District, filed March 31, 2006, RJN3-6.) In the instant action, by contrast, UTI asserts claims solely on behalf of Ukraine. (*See* Verified Second Amended Complaint, filed January 10, 2000, ¶¶ 195-96, 198, 202, 204-06, 209-11, 216-17, 221-23, 227-28, 230, 233, 239-40, 245-46, 251.) Regardless of whether UTI may be able to enforce the UESU judgment against Lazarenko in a separate action, the UESU judgment provides no basis for UTI to assert claims on behalf of Ukraine in the instant action.

CONCLUSION

For the reasons set forth above,

1. Plaintiffs' motions to supplement the record are hereby GRANTED.

2. Defendants' motion for summary judgment is hereby GRANTED.

The Clerk shall close the file.

IT IS SO ORDERED.

Dated: September 7, 2007 /s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNIVERSAL TRADING & INVESTMENT CO.,

Plaintiff

v.

PETRO MIKOLAYEVICH KIRITCHENKO, et al.,

Defendants. /

No. CV-99-3073 MMC

JUDGMENT IN A CIVIL CASE

(Filed Sep. 10, 2007)

( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED

1. Plaintiffs' motions to supplement the record are hereby GRANTED.

2. Defendants' motion for summary judgment is hereby GRANTED.

Dated: September 10, 2007

Richard W. Wicking, Clerk

By: /s/ Tracy Lucero
Tracy Lucero
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNIVERSAL TRADING & INVESTMENT CO.,

Plaintiff

v.

PETRO MIKOLAYEVICH KIRITCHENKO, et al.,

Defendants.

/

No. C-99-3073 MMC (EDL)

ORDER DENYING PLAINTIFF'S ADMINISTRATIVE MOTION TO EXCEED VOLUME OF MOTION UNDER RULE 59(e); DENYING AS MOOT PLAINTIFF'S ADMINISTRATIVE MOTIONS TO FILE DOCUMENTS UNDER SEAL AND FOR PROTECTIVE ORDER; DIRECTIONS TO CLERK

(Filed Oct. 11, 2007)

Before the Court is "Plaintiff's Administrative Motion to Exceed Volume of Motion Under Rule 59(e)," filed September 18, 2007, and opposition thereto.

Plaintiff seeks to exceed this District's 25-page limitation, *see* Civil Local Rule 7-2(b), assertedly in order to file a 35-page memorandum of points and authorities, *see* Pl.'s Admin. Mot. to Exceed Volume at 1:22-23, in support of plaintiff's "Motion Pursuant to Rule 59(e) to Alter, Amend, and/or Rescind Summary Judgment dated September 7, 2007 and to Proceed to Scheduled Trial or in the Alternative for Stay and to Grant Application for Letters Rogatory to Ukraine" (hereinafter "Motion Pursuant to Rule 59(e)"). Contrary

to plaintiff's characterization, plaintiff's proposed argument far exceeds the 35-page memorandum. The memorandum is accompanied by a 12-page "Affidavit" with 83 pages of "Exhibits," as well as three "Annexes" consisting of a total of 49 additional pages, which Affidavit and Exhibits consist in great part of legal argument, in violation of the Civil Local Rules of this District. *See* Civil Local Rule 7-5(b) ("An affidavit or declaration may contain only facts . . . and must avoid conclusions and argument. . . . An affidavit or declaration not in compliance with this rule may be stricken in whole or in part."). The Annexes contain two "Renewed Applications," specifically, an application for issuance of a letter of request for official records and an application for leave to file a joint statement of undisputed facts,[1] as well as a 37-page table presenting plaintiff's arguments with respect to alleged factual disputes. Together, the proposed motion and accompanying materials contain approximately 113 pages of argument.

Accordingly, plaintiff's "Administrative Motion to Exceed Volume of Motion Under Rule 59(e)" is hereby DENIED, and plaintiff's Motion Pursuant to Rule 59(e) filed September 18, 2007, along with the

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[1] The Court previously denied plaintiff's original application for issuance of a letter of request for official records, *see* Order filed May 17, 2004, and original application for leave to file a joint statement of undisputed facts, *see* Order filed February 7, 2006.

"Affidavit," "Exhibits," and "Annexes" accompanying said motion, is hereby STRICKEN from the record.

Plaintiff's related "Administrative Motion to File Documents Under Seal," filed September 19, 2007, by which plaintiff requests leave to file under seal portions of three additional affidavits offered in support of plaintiff's Motion Pursuant to Rule 59(e), and plaintiff's "Administrative Motion for Protective Order with regard to Portions of Documents Filed under Seal," filed September 28, 2007, are hereby DENIED as moot.[2]

The Clerk is hereby DIRECTED to follow the procedure set forth in Civil Local Rule 79-5(e).

IT IS SO ORDERED.

Dated: October 11, 2007 /s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States
District Judge

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[2] Additionally, if plaintiff, in the future, seeks to file documents under seal, plaintiff must comply with Civil Local Rule 79-5(a); in particular, any request for a sealing order must establish "that the document, or portions thereof, is privileged or protectable as a trade secret or otherwise entitled to protection under the law" and "must be narrowly tailored to seek sealing only of sealable material." *See* Civil L.R. 79-5(a).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNIVERSAL TRADING & INVESTMENT COMPANY,

Plaintiff,

v.

PETRO MIKOLAYEVICH KIRITCHENKO, et al.,

Defendants

/

No. C-99-3073 MMC (EDL)

ORDER DENYING PLAINTIFF'S MOTION TO REFILE, RULE 59(e) MOTION, APPLICATION FOR LETTER OF REQUEST, MOTION TO ALTER, MOTION FOR LEAVE OF APPEAL, REQUEST FOR DOCUMENTS, AND MOTION TO AMEND; VACATING HEARING

(Filed Jan. 10, 2008)

Before the Court are seven motions filed by plaintiff: (1) "Administrative Motion to Refile Papers of the Motion" ("Motion to Refile"), filed October 12, 2007[1]; (2) "Motion Pursuant to Rule 59(e) to Alter, Amend and/or Reconsider Summary Judgment Dated September 7, 2007 and to Proceed to Trial or in the Alternative for Stay" ("October 12 Rule 59(e)

[1] Defendants Peter, Izabella, and Ludmilla Kiritchenko, Bancross U.S. Holdings, Inc., BRC Property Holdings, LLC, Xanadu Property Holdings, LLC, and ABS Trading, Inc. (collectively, "Kiritchenko defendants") filed opposition to said motion; Defendant Michael Menko filed a joinder thereto.

Motion"), filed October 12, 2007[2]; (3) "Renewed Application for the Issuance of a Letter of Request for Official Records" ("Application for Letter of Request"), filed October 12, 2007[3]; (4) "Supplemental Motion to Alter Order, Dated October 11, 2007" ("Motion to Alter"), filed October 19, 2007[4]; (5) "Petition and/or Motion for Leave of Appeal Involving Controlling Questions of Law and Motion for Preliminary Injunction" ("Motion for Leave of Appeal"), filed October 26, 2007[5]; (6) "Administrative Request for Leave and Supplemental Request for Orders to Produce Documents in Connection with Affidavits Filed on November 19, 2007 and Pending Motion Pursuant to Rule 59(e)," ("Request for Documents"), filed November 19, 2007[6]; and (7) "Motion Pursuant to Rule 15(b) & (d) to

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[2] The Kiritchenko defendants filed opposition to said motion; Defendant Michael Menko filed a joinder therein. Plaintiff filed a reply. Additionally, in connection with an administrative motion for protective order, previously filed by plaintiff, the Court permitted plaintiff to file certain documents in the public record and, upon such filing, afforded defendants the opportunity to file a supplemental opposition and plaintiff the opportunity to file a supplemental reply thereto.

[3] The Kiritchenko defendants filed opposition to said application; Defendant Michael Menko filed a joinder thereto. Plaintiff filed a reply.

[4] The Kiritchenko defendants filed opposition to said motion; Defendant Michael Menko filed a joinder thereto. Plaintiff filed a reply.

[5] The Kiritchenko defendants filed opposition to said motion; Defendant Michael Menko filed a joinder thereto. Plaintiff filed a reply.

[6] Defendant Lazarenko filed opposition to said request.

Amend Pleading to Conform to the Evidence; to Supplement Pleadings with Additional Evidence; and Submission of Verified (Proposed) Third Amended Supplemental Complaint," ("Motion to Amend"), filed December 7, 2007.[7]

Having reviewed the parties' respective submissions, the Court finds the matters appropriate for resolution without oral argument, *see* Civil L.R. 7-1(b), hereby VACATES the January 11, 2008 hearing on plaintiff's Motion to Amend, and rules as follows.[8]

A. Procedural Background

By order filed September 7, 2007, the Court granted defendants' motion for summary judgment. (*See* Order Granting Defendants' Motion for Summary Judgment Re: Standing at 34:23.) On September 10, 2007, the Clerk entered judgment thereon. On September 18, 2007, plaintiff filed an "Administrative Motion to Exceed Volume of Motion Under Rule 59(e)" ("Motion to Exceed Volume") and, in conjunction therewith, a "Motion Pursuant to Rule 59(e) to Alter, Amend, and/or Rescind Summary Judgment Dated September 7, 2007 and to Proceed to Scheduled Trial or in the Alternative for Stay and to Grant

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[7] The Kiritchenko defendants filed opposition to said motion; Defendant Michael Menko filed a joinder thereto. Plaintiff filed a reply.

[8] To the extent hearings were noticed on the other matters, those hearings were previously vacated.

Application for Letters Rogatory to Ukraine" ("September 18 Rule 59(e) Motion"), which motion exceeded this District's 25-page limitation for motions. (*See* Civil L.R. 7-2(b).)

On October 11, 2007, the Court denied plaintiff's Motion to Exceed Volume and struck the noncompliant document from the record. (*See* Order Denying Plaintiff's Administrative Motion to Exceed Volume of Motion Under Rule 59(e) at 2:11-13.)

On October 12, 2007, plaintiff filed the instant Motion to Refile, wherein plaintiff seeks leave "to refile documents pertaining to the [September 18 Rule 59(e) Motion]." (*See* Mot. to Refile at 1:22-23.) On that same date, plaintiff also filed its October 12 Rule 59(e) Motion, a related motion for a protective order, which the Court subsequently denied, (*see* Order filed November 14, 2007), and the Application for Letter of Request.

On October 15, 2007, plaintiff filed a Notice of Appeal "from the Summary Judgment Order made on September 7, 2007, and from the Denial of Administrative Relief to Exceed Volume and other relief dated October 11, 2007." (*See* Notice of Appeal filed October 15, 2007 at 1:26-28.)

Thereafter, plaintiff filed, on the dates set forth above, its Motion to Alter, Motion for Leave of Appeal, Request for Documents, and Motion to Amend.

B. Motion to Refile

In its Motion to Refile, plaintiff seeks, in essence, the Court's approval of its filing the October 12 Rule 59(e) Motion.

A motion for relief pursuant to Rule 59(e) of the Federal Rules of Civil Procedure must be filed within 10 days of entry of judgment. *See* Fed. R. Civ. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.") In the instant case, judgment was entered on September 10, 2007, (*see* Judgment in a Civil Case, filed September 10, 2007), and, consequently, any motion under Rule 59(e) was required to be filed no later than September 24, 2007. Plaintiff's October 12 Rule 59(e) Motion is not timely as it was filed well beyond the 10-day period provided for the filing of such motions, and the Court may not extend the 10-day period. *See* Fed. R. Civ. P. 6(b) (providing district court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them");[9] *see also Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984) (holding 10-day period for filing Rule 59(e) motion "cannot be extended by the Court").

To the extent plaintiff suggests its filing of the September 18 Rule 59(e) Motion served to preserve

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[9] Rule 59(e) does not provide for any extension of the 10-day period. *See* Fed. R. Civ. P. 59(e).

its right to file the October 12, 2007 Rule 59(e) Motion, plaintiff submits no argument, let alone authority, in support thereof.

Accordingly, the Motion to Refile is hereby DENIED.

C. October 12 Rule 59(e) Motion

As stated above, plaintiff's October 12, 2007 Rule 59(e) Motion was not filed within 10 days of entry of judgment, and, consequently, is untimely under Rule 59(e). *See* Fed. R. Civ. P. 59(e).

Alternatively, assuming, *arguendo*, the October 12, 2007 Rule 59(e) Motion were not barred as untimely, the Court, having considered the motion on its merits, finds plaintiff has failed to show it is entitled to relief pursuant to Rule 59(e). As the Kiritchenko defendants note, plaintiff fails to: (a) present "newly discovered evidence," (b) demonstrate the Court "committed clear error or the initial decision was manifestly unjust," or (c) show "an intervening change in controlling law." *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (setting forth grounds for relief under Rule 59(e)).

Accordingly, the October 12 Rule 59(e) Motion is hereby DENIED.

D. Application for Letter of Request, Motion to Alter, Motion for Leave of Appeal, Request for Documents, and Motion to Amend

To the extent the Application for Letter of Request, Motion to Alter, Request for Documents, and Motion to Amend may be considered as support for, and in connection with, plaintiff's October 12 Rule 59(e) Motion, the Court, as set forth above, has found the October 12 Rule 59(e) Motion is both untimely and lacking in merit, and, accordingly, said matters will be denied on the same grounds. To the extent the four matters may be considered, as separate and distinct from plaintiff's October 12 Rule 59(e) Motion, said matters, as well as plaintiff's Motion for Leave of Appeal, will be denied for lack of jurisdiction, as set forth below.

As noted, plaintiff filed a Notice of Appeal on October 15, 2007, wherein plaintiff states it "appeals from the Summary Judgment Order made on September 7, 2007, and from the Denial of Administrative Relief to Exceed Volume and other relief dated October 11, 2007." (*See* Notice of Appeal at 1:26-28.)

"The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed." *Davis v. U.S.*, 667 F.2d 822, 824 (9th Cir. 1982). The district court retains jurisdiction, however, if a timely motion under Rule 59(e) is pending at the time a notice of appeal is filed. *See* Fed. R. App. P.

4(a)(4)(B)(i)[10]; *see also Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) (holding "notice of appeal is jurisdictionally ineffective if filed before disposition of a Rule 59(e) motion to alter or amend the judgment") (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982)); *Scott v. Younger*, 739 F.2d at 1467 ("The filing of an untimely [Rule 59(e)] motion will not toll the running of the appeal period.").

Here, before plaintiff filed its Notice of Appeal, the Court issued its order denying plaintiff's September 18 Rule 59(e) Motion, and, as set forth above, the Court has found plaintiff's October 12 Rule 59(e) Motion to be untimely. Consequently, there was no timely Rule 59(e) motion pending at the time plaintiff filed its Notice of Appeal on October 15, 2007, and on that date the Court lost jurisdiction to consider any aspect of the case involved in the appeal. *See Griggs*, 459 U.S. at 58 (holding filing of notice of appeal "divests the district court of its control over those

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[10] Federal Rule of Appellate Procedure 4(a)(4)(B)(i) provides:

> If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

Fed. R. App. P. 4(a)(4)(B)(i). A motion "to alter or amend the judgment under Rule 59" is listed in Rule 4(a)(4)(A). *See* Fed. R. App. P. 4(a)(4)(A)(iv).

aspects of the case involved in the appeal"). As set forth below, plaintiff's Application for Letter of Request, Motion to Alter, Motion for Leave of Appeal, Request for Documents, and Motion to Amend all seek relief related to aspects of the case involved in the appeal. *See id.*

In its Application for Letter of Request, plaintiff seeks the issuance of a letter of request "addressed to the Central Authority of Ukraine," (*see* App. for Letter of Request at 1:27-28), in order to obtain "certified records of documents," (*see id.* at 1:28); plaintiff asserts the Court's "Summary Judgment ruling relied on unauthenticated foreign documents purporting to be official." (*See* Reply to Defs.' Opp'n to Pl.'s App. for Letter of Request at 3:17.) Because plaintiff has appealed the summary judgment ruling at issue, (*see* Notice of Appeal at 1:26-27), the Court lacks jurisdiction over the Application for Letter of Request.

In its Motion to Alter, plaintiff asks the Court to reconsider its October 11, 2007 order, wherein the Court denied plaintiff's Motion to Exceed Volume. (*See* Mot. to Alter at 2:3-13.) Because plaintiff has appealed the October 11, 2007 order, (*see* Notice of Appeal at 1:27-28), the Court lacks jurisdiction over the Motion to Alter.

In its Motion for Leave of Appeal, plaintiff seeks leave to appeal "the Summary Judgment Order dated September 7, 2007" and "the October 11, 2007 Order," (*see* Mot. for Leave of Appeal at 1:26-27), each of which is expressly referenced as a subject of

plaintiff's appeal, (*see* Notice of Appeal at 1:26-28), and, consequently, the Court lacks jurisdiction over the Motion for Leave of Appeal.

In its Request for Documents, plaintiff seeks to compel disclosure of documents plaintiff asserts are "relevant to plaintiff's standing," (*see* Req. for Docs. at 1:27), and, in its Motion to Amend, plaintiff seeks to amend the complaint based on new facts, "including facts concerning standing," (*see* Motion to Amend at 2:1). Plaintiff's standing is an "aspect[ ] of the case involved in the appeal." *See Griggs*, 459 U.S. at 58. As noted, plaintiff has appealed the Court's "Summary Judgment Order made on September 7, 2007." (*See* Notice of Appeal at 1:26-27.) That order was based on plaintiff's lack of standing. (*See* Order Granting Defendants' Motion for Summary Judgment Re: Standing at 33:5-7.) Consequently, the Court lacks jurisdiction over the Request for Documents and Motion to Amend.

Finally, assuming, *arguendo*, the Court has jurisdiction to hear and decide each of the above five matters, given the Court's denial of the October 12 Rule 59(e) Motion, each of said matters is moot and, consequently, subject to denial on such ground.

Accordingly, the Application for Letter of Request, Motion to Alter, Motion for Leave of Appeal, Request for Documents, and Motion to Amend are, in each instance, hereby DENIED.

IT IS SO ORDERED.

Dated: January 10, 2008

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNIVERSAL TRADING & INVESTMENT CO.,

Plaintiff

v.

PETRO MIKOLAYEVICH KIRITCHENKO, et al.,

Defendants. /

No. C-99-3073 MMC (EDL)

ORDER DENYING ADMINISTRATIVE REQUEST TO SET CONFERENCE

(Filed Feb. 8, 2008)

Before the Court is plaintiffs administrative request, filed February 6, 2008, to set a conference for the purpose of scheduling "motions for entry of default, contempt, sanctions, attorneys fees and to obtain relief from the Sept. 7, 2007, summary judgment order under FRCP 60(b)." (*See* Pl.'s Admin. Request at 3:21-23.)

Each of said proposed motions is predicated on plaintiffs argument, made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, that the Court's order filed September 7, 2007 ("September 7, 2007 Summary Judgment Order"), wherein the Court granted summary judgment to defendants, is void. (*See id.* at 3:18-19.) Plaintiff has appealed the September 7, 2007 Summary Judgment Order. (*See* Notice of Appeal filed October 15, 2007 at 1:26-27.) The pendency of such appeal divests the district court of jurisdiction to decide plaintiff's proposed Rule 60(b) motion and related motions. *See Visioneering Constr.*

& Dev. Co. v. United States Fidelity & Guar., 661 F. 2d 119, 124 n. 6 (9th Cir. 1981) ("Once a notice of appeal is filed, jurisdiction is vested in the Court of Appeals, and the trial court thereafter has no power to modify its judgment in the case or proceed further except by leave of the Court of Appeals"); *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984) (holding "district court did not have jurisdiction to decide the [Rule 60(b)] motion since the case was on appeal").

Accordingly, the Court hereby DENIES plaintiff's request to set a conference, for the reason plaintiff has failed to show this Court would have jurisdiction to consider the motions plaintiff proposes to schedule at such a conference.

IT IS SO ORDERED.

Dated: February 8, 2008 /s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNIVERSAL TRADING & INVESTMENT CO.,

Plaintiff

v.

PETRO MIKOLAYEVICH KIRITCHENKO, et al.,

Defendants. /

No. C-99-3073 MMC (EDL)

ORDER DENYING ADMINISTRATIVE REQUEST TO SET CONFERENCE

(Filed June 16, 2008)

Before the Court is plaintiff's Administrative Request, filed March 4, 2008, that the Court indicate its willingness to entertain a motion, to be brought pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, based on plaintiff's purported discovery of fraud upon the Court. On March 7, 2008, defendants Peter Kiritchenko, Izabella Kiritchenko, Ludmilla Kiritchenko, Bancross U.S. Holdings, Inc., BRC Property Holdings, LLC, Xanadu Property Holdings, LLC, and ABS Trading, Inc. (collectively, "Kiritchenko Defendants") filed opposition, in which defendants Pavel Lazarenko, Tamara Lazarenko, and Dugsbery, Inc. (collectively, "Lazarenko Defendants") and defendant Michael Menko ("Menko") have joined. On March 17, 2008, plaintiff filed "supplemental evidence," to which the Kiritchenko Defendants and

Lazarenko Defendants, with leave of Court, each filed supplemental opposition, in which Menko joined.[1]

DISCUSSION

As noted, plaintiff argues the Court should entertain a motion for relief from the Court's September 7, 2007 order granting summary judgment in favor of defendants ("Summary Judgment Order"), based on "the discovery of fraud on the Court." (*See* Admin. Request at 1:5-6.) In particular, plaintiff asserts that the Lazarenko Defendants failed to disclose two relevant decisions rendered in Lazarenko's Ukrainian litigation: (1) a Ukrainian Supreme Court decision issued June 14, 2006 (hereafter, "Ukrainian Supreme Court Decision"), which decision reversed two Ukranian lower court rulings on which defendants relied in challenging plaintiffs standing, and remanded

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[1] In addition to the above-referenced documents, plaintiff subsequently filed, on April 1, 2008, a certified court judgment "and other evidence," and, on April 16, 2008, further "supplemental evidence." Thereafter, on April 24, 2008, the Lazarenko Defendants filed a "further submission" in support of their opposition, to which filing plaintiff, on April 28, 2008, filed an objection.

The document filed on April 1, 2008, and each document filed thereafter, were filed without obtaining prior Court approval. *See* Civil L.R. 7-3(d) (providing, with exception of Statement of Recent Decision, "once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval"). Although each of the documents is subject to being stricken on such ground, the Court will exercise its discretion and consider the documents and arguments contained therein.

Lazarenko's case to the trial court, (*see* Pl.'s Appendix in Support of Pl.'s Admin. Request Ex. A); and (2) a Pechersk district court decision, issued November 30, 2006 upon remand, in which the trial court dismissed Lazarenko's claims without consideration, and without prejudice, based on Lazareko's [sic] counsel's failure to appear at two consecutive court hearings, (*see id.* Ex. B). Similarly, plaintiff contends, the Kiritchenko Defendants failed to disclose the above-referenced Ukrainian Supreme Court Decision, despite, plaintiff asserts, the Kiritchenko Defendants' having said decision translated into English on September 19, 2006. (*See id.* at 2:5-7.)

"In order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *England v. Doyle,* 281 F.2d 304, 309 (9th Cir. 1960) (citations omitted). Further, a finding of fraud on the court requires that "a 'grave miscarriage of justice'" have [sic] occurred. *See Appling v. State Farm, Mutual Automobile Ins. Co.,* 340 F.3d 769, 780 (9th Cir. 2003) (quoting *United States v. Beggerly,* 524 U.S. 38, 47 (1998)). Consequently, "[n]on-disclosure [of documents], or perjury by a party or witness, does not, by itself, amount to fraud on the court." *Id.* (citation omitted).

"[T]he burden is on the moving party to establish the fraud by clear and convincing evidence." *England,* 281 F.2d at 309-10. The "court places a high burden on a plaintiff seeking relief from a judgment based on

fraud on the court." *See Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1104 (9th Cir. 2006). "Liberal application [of the doctrine] is not encouraged, as fraud on the court should be read narrowly, in the interest of preserving the finality of judgments." *Id.*

1. Lazarenko Defendants

Here, with respect to the Lazarenko Defendants, plaintiff asserts that Ganna L. Korotka ("Korotka"), an attorney representing Lazarenko in Ukraine, was served with a copy of the Ukrainian Supreme Court Decision. (*See* Pl.'s "Supplemental Evidence" filed March 17, 2008 at 2:10-12.) Plaintiff further asserts that another attorney representing Lazarenko in Ukraine, Eugenia Kolody ("Kolody"), "concealed" the Ukrainian Supreme Court Decision, and "knew" of the subsequent November 30, 2006 trial court decision dismissing Lazarenko's claims, contrary to statements Kolody made in her December 2006 declaration. (*See id.* at 2:27-3:4.)

Plaintiff fails, however, to provide sufficient evidence in support of either contention. Although plaintiff submits evidence indicating Korotka was served with other Ukrainian court documents, the Ukrainian Supreme Court Decision is not among those documents. (*See* Plyamovaty Aff. in Support of Pl.'s Supp. Evidence Exs. F, G, K and L.) Plaintiff likewise fails

to demonstrate Kolody was served with a copy of either of the two Ukrainian court decisions.[2]

At best, the evidence submitted by plaintiff suggests that Lazarenko's Ukrainian attorneys did not adequately communicate with each other regarding their respective roles in representing Lazarenko. Plaintiff has failed to establish by clear and convincing evidence that the Lazarenko Defendants engaged in "an unconscionable plan or scheme . . . designed to improperly influence the court in its decision." *See England*, 281 F.2d at 309.

Moreover, even assuming, *arguendo*, plaintiff could show the Ukrainian Supreme Court Decision was not properly disclosed by the Lazarenko Defendants, the Court, for the reasons set forth below, finds plaintiff has failed to show such omission resulted in "a grave miscarriage of justice." *See Appling*, 340 F.3d at 780. In particular, the Court finds unpersuasive plaintiff's argument that the Summary Judgment Order should be "found void," (*see* Admin. Request at 1:27), because "[t]he [Ukranian [sic]]

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[2] To the extent plaintiff asserts that another attorney who practices with Kolody, specifically, Kolody's son Oleg Kolody, knew about the November 30, 2006 decision because he was present at the hearing held on that date, such assertion is refuted by the uncontested declaration of Oleg Kolody, in which he states that his request to appear at the hearing was denied, (*see* Lazarenko Defs.' Supp. Opp'n Ex. B ¶¶ 4, 5), that "the court did not allow [him] to see or access the files of the case," (*see id.*), and that he was not aware of the November 30, 2006 decision, (*see id.* ¶ 9).

Supreme Court's . . . ruling removed any basis for summary judgment," (*see* Aff. of Dr. Youry A. Lambert in Support of Pl.'s Admin. Request ("Lambert Aff.") Ex. B at 2).

First, the Ukranian [sic] Supreme Court's reversal and remand in Lazarenko's Ukrainian case was based on procedural deficiencies and did not purport to find the assignment valid, (*see* Clements Decl. Ex. F at 4 (reversing underlying decision for failure to comply with Article 213 of Ukrainian Code of Civil Procedure; ruling "case shall be submitted for reconsideration to the trial court")), and, on remand, Lazarenko's case was dismissed without prejudice as a result of his counsel's failure to appear, (*see id.* Ex. G). Second, as the Summary Judgment Order makes clear, this Court reached it's decision by an analysis that did not depend upon the Ukrainian court decisions submitted by the parties. *See* Summary Judgment Order at 31:23-26 ("Having read and considered the applicable statutes, constitutional provisions, and expert opinions, the Court finds, even without consideration of the Ukrainian court decisions, that the PGOU lacked the authority to assign claims of Ukraine to UTI.") In sum, neither the Ukrainian Supreme Court Decision, nor the subsequent dismissal by the trial court, purported to be rulings on the merits of plaintiff's assignment, and, in any event, this Court reached its decision independent of the Ukrainian court decisions. Consequently, plaintiff has failed to show any failure to disclose those decisions affected, in any manner, this

Court's determination of the issues addressed in the Summary Judgment Order, much less that any such omission resulted in the requisite "grave miscarriage of justice."

2. Kiritchenko Defendants

Plaintiff contends the Kiritchenko Defendants had the Ukrainian Supreme Court Decision in Lazarenko's Ukrainian litigation translated into English on September 19, 2006, but failed to disclose the decision to plaintiff. The Kiritchenko Defendants have provided unrefuted evidence, however, that the document they had translated on September 19, 2006 was a Supreme Court decision in Kiritchenko's Ukrainian litigation, not a decision in Lazarenko's Ukrainian litigation. (*See* Clements Decl. Ex. A (September 19, 2006 invoice from IDEM Translations, Inc., invoice number "200609-0113" for "Translation of Ukrainian Supreme Court Ruling") and Ex. B (English translation of Ukrainian Supreme Court decision in Kiritchenko's litigation, labeled "IDEM Job No. 0609-113," with translation certificate dated September 19, 2006).) Consequently, plaintiff has failed to show the Kiritchenko Defendants had possession of the Ukrainian Supreme Court Decision, which decision was issued in Lazarenko's Ukrainian litigation. Plaintiff has failed to submit any other evidence to even suggest the Kiritchenko Defendants engaged in "an unconscionable plan or scheme . . . designed to improperly influence the court." *See England*, 281 F.2d at 309.

CONCLUSION

For the reasons set forth above, the Court would decline to entertain a Rule 60(b) motion and, accordingly, plaintiffs administrative request is hereby DENIED.

IT IS SO ORDERED.

Dated: June 16, 2008

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNIVERSAL TRADING & INVESTMENT COMPANY, INC., Plaintiff-Appellant, v. PETRO MIKOLAYEVICH KIRITCHENKO; et al., Defendants-Appellees.	No. 07-16873 D.C. No. CV-99-03073-MMC Northern District of California, San Francisco ORDER (Filed Nov. 18, 2009)

Before: TROTT and BEA, Circuit Judges, and CONLON,* District Judge.

Appellant's petition for a panel rehearing is denied. The panel recommends that the petition for rehearing en banc be denied.

Judge Bea has voted to deny the suggestion for rehearing en banc, and Judges Trott and Conlon so recommend. All judges voted to deny the petition for panel rehearing.

The suggestion for rehearing en banc has been circulated to the full court, and no judge has

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* The Honorable Suzanne B. Conlon, United States District Judge for the Northern District of Illinois, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

Appellant's petition for panel rehearing and suggestion for rehearing en banc are denied.

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UNITED STATES DISTRICT COURT

FOR NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

UNIVERSAL TRADING & INVESTMENT COMPANY, a Massachusetts corporation Plaintiff, vs. PETRO MIKOLAYEVICH KIRITCHENKO, an individual, et al., Defendants.	No. 99-3073 MMC/EDL **AFFIDAVIT OF DR. W. SCOTT THOMPSON IN SUPPORT OF PLAINTIFF'S OPPOSITION AND OF CROSS-MOTION UNDER RULE 56(g) AND FOR CONTINUANCE** **RE.: DEFENDANTS KIRITCHENKOS MOTION FOR SUMMARY JUDGMENT** **Date: February 10, 2006** **Time: 9:00 AM**

Court: Courtroom 7, 19th Floor
Judge: The Hon. Maxine M. Chesney

(Filed Jan. 20, 2006)

I, Dr. W. SCOTT THOMPSON, DECLARE AND STATE AS FOLLOWS:

1. I am the Chairman of the Board of plaintiff Universal Trading & Investment Co. (hereinafter "UTICo"), a corporation duly organized and existing under the laws of Massachusetts. I have personal knowledge of the matters stated in this affidavit, and if called as a witness, I could and would testify competently as to those matters; and as to those matters, stated on information and belief, I believe them to be true.

Introduction

2. My background includes a B.A. from Stanford University and D.Phil. from Oxford University, where I was a Rhodes Scholar from California, as well as a Woodrow Wilson and Danforth Foundation Fellow. I have also been a White House Fellow. I have held three additional presidential appointments with consent of the Senate, under Presidents Reagan, Bush (Sr.) and Clinton: Associate Director of USIA and twice appointed to the Board of the U.S. Institute of Peace, a congressionally funded position. Among other academic affiliations, I have served as an associate of

Harvard's Center for International Affairs, Washington's Center for Strategic and International Studies, and for 36 years, 25 of these tenured, I have been on the faculty of the Fletcher School of Law and Diplomacy, Tufts University, and for four years was a visiting professor at Georgetown University. I am a member of the Council on Foreign Relations in New York and London's International Institute of Strategic Studies. My publications have included eleven books.

3. Since 1998 I have dedicated considerable time and effort to overview and direct UTICo's contractual work for the Prosecutor General's Office of Ukraine in various investigative actions and legal proceedings throughout the world to locate, identify, freeze and help recover the funds and assets that were misappropriated and laundered by former Ukrainian Prime Minister Pavlo Lazarenko (hereinafter "Lazarenko") and his former assistant Petro Kiritchenko (hereinafter "Kiritchenko").

4. I submit this Affidavit for asserting standing of Plaintiff with regard to its claims against Dugsbery Inc., a California corporation, and Plaintiff's rights for relief herein.

Track Record of Plaintiff's Work under May 1998 Agreement with Ukraine

5. As its major line of business, UTICo has substantial experience and record of success in the field of international recovery of assets. Among its clients seeking recovery of misappropriated assets, there

have been banks, corporations, private individuals and foreign government entities. In the latter category, UTICo has been working for the government of Ukraine with regard to Lazarenko's and his co-conspirators' assets since 1997.

6. As one of its accomplishments, UTICo has been instrumental for uncovering (in more than a dozen offshore jurisdictions) the extensive RICO conspiracy that is at issue in the civil action herein. UTICo has been instrumental in freezing over $350 million of the funds and assets converted by defendants Lazarenko, Kiritchenko and their co-conspirators.

7. Under Lazarenko tenure as the prime minister in 1996-1997, Ukraine suffered substantial damages from two main instrumentalities in the so called "natural gas scheme" staged by Lazarenko, namely United Energy Systems of Ukraine ('UESU') and United Energy International Ltd. ('UEI') in London. According to subsequent Ukrainian law enforcement statements, in that natural gas scheme, promoted by Lazarenko, about $2 billion 271 million were illegally siphoned from Ukraine and ended on offshore accounts of various Ukrainian individuals. For the Ukrainian prosecution's description of the scheme of money laundering see Brief of Amicus of Ukraine in this action in **EXHIBIT 12** (exhibits numbered chronologically).

8. After Lazarenko was dismissed in July of 1997, UTICo was able to trace the secretive ownership of UESU and UEI to the British Virgin Islands (BVI),

through a three-tier subsidiary scheme, leading to Bassington Ltd., controlled by a local agent firm Mossack Fonseca in the BVI, with main office in Panama.

9. UTICo's corporate program of assistance to Ukraine was effectively commenced in late 1997 when UTICo was successful in causing the repatriation to Ukraine of the first $1.1 million from the natural gas scheme. Namely, in the course of its other contractual collection business, UTICo came across evidence on a major money laundering scheme of PFG United Energy Systems of Ukraine that provided secret kickbacks to Lazarenko abusing his prime minister's powers for personal enrichment.

10. When Lazarenko was removed from the prime minister's office in July of 1997, the next month UTICo sent reports on its discoveries and evidence to Ukrainian authorities concerning PFG United Energy Systems of Ukraine (as well as to report on its preliminary findings regarding Lazarenko and others to the FBI). Ukrainian authorities expressed their gratitude for the assistance to Ukrainian law enforcement. For example, **EXHIBIT 1** represents a true and correct copy of the Letter of gratitude from First Deputy Minister of the Interior of Ukraine, dated October 13, 1997, outgoing #9/13-4033. That document has not been contested by defendants. **EXHIBIT 2** represents a true and correct copy of the letter of gratitude from the Prosecutor General's Office of Ukraine for assistance provided by UTICo, dated February 9, 1999. **EXHIBIT 3** represents the Brief of Amicus Curiae of Ukraine issued for a related

proceedings, in U.S. District Court for the District of Massachusetts, dated April 24, 1998, outgoing #12-01379-97. That document has not been contested by any defendants.

11. In order to prevent or handicap UTICo's developing assistance to Ukraine, UESU and its shadow principals headed by Lazarenko first filed a case against UTICo, 97cv12180, in U.S. District Court for the District of Massachusetts in late 1997, alleging libels. In that action UTICo counterclaimed alleging RICO activities of UESU's principals and damages. [That case has been completed after almost 8 years with the judgment by default for UTICo for $18,344,480, **EXHIBIT 27**, addressed below]. As UTICo duly pled in U.S. District Court for the District of Massachusetts, Lazarenko should be held jointly and severally liable with UESU on that judgment.

12. On May 15, 1998, UTICo reached, after several months of negotiations, an agreement with Ukraine on a complex of assistance in recovery of assets (the "Agreement"), with a 12% interest, a 'finder's fee' and assistance in all related work on freezing assets towards their recovery. The Agreement was executed by the Acting Prosecutor General Bogdan Ferents. UTICo was in competition with Kroll Associates active in Eastern Europe. Ukraine elected UTICo that proposed clear strategy and straight contingency terms. The Agreement acknowledged that UTICo had already actually started to provide assistance to Ukraine: *"Taking into account information and*

assistance that Universal Trading & Investment Co. is providing . . ."

13. As the banking records later confirmed UTICo's assessments, more than 90% of Lazarenko's criminal assets came in kickbacks from UESU/UEI operating under the Ukrainian government's license from Lazarenko's Cabinet of Ministers. Those assets then became in part secret personal assets on offshore accounts of Lazarenko and his co-conspirators.

14. For the true and correct copy of the Agreement, the PGO's document #12-01379-97, see **EXHIBIT 4**. For the true and correct copy of an accompanying Power of Attorney dated April 14, 1998, see **EXHIBIT 5**. These documents being in UTICo's possession, has been admitted or not contested by any defendants.

15. On June 5-12 1998, UTICo was successful to obtain in the course of its mission and negotiations with the Governor of the British Virgin Islands Sir McKilligin (later Governor Francis Savage) and with the local Attorney General, the critical discovery in that jurisdiction, exposing Lazarenko's secret offshore holdings in Guernsey. That discovery was obtained upon a local High Court order issued in the British Virgin Islands, on an emergency basis, on Saturday, June 12, 1998, with search of the offshore agent's office effected by British police on the same Saturday. As the Governor advised UTICo, a great exception was made in that matter: submitting and processing letters rogatory normally takes 1-2 years in that jurisdiction.

16. In prompt sequence less than three weeks later, on about July 2, 1998, the first pocket of Lazarenko's assets, in the amount of about $144 million in the name of Samante Co., registered in the Isle of Man, was frozen through UTICo's work on the accounts at Credit Suisse Trust Co. bank in Guernsey, the Channel Islands. Kiritchenko and Lazarenko practically immediately filed several actions in Guernsey to preempt the release of the banking documents, resulting from search and freeze of assets. That included an emergency appellate complaint to the Privy Council in August of 1998. For copy of that urgent complaint see **EXHIBIT 6**.

17. On October 2, 1998, the newly appointed Prosecutor General of Ukraine Mikhailo Potebenko, who was voted into office by Parliament, executed per UTICo's request the instrument of ratification, confirmation and the terms' expansion of the May 15, 1998 Agreement. For the true and correct copy of the PGO's document, outgoing #12-11015-97 see **EXHIBIT 7**. This document, the original being in UTICo's possession, has been admitted or not contested by any defendants.

18. Successfully working on implementing that worldwide collection and services agreement with Ukraine, UTICo was effective in obtaining critical evidence in offshore and other jurisdictions. UTICo undertook various investigatory missions for the Prosecutor General's Office, for obtaining evidence and blocking criminal assets of Lazarenko's and Kiritchenko's conspiracy.

19. For example, UTICo was successful in obtaining the search and deposition Order of the Supreme Court of Panama for deposing the offshore Panamanian agent about the offshore entities GHP Corp. and Wilnorth Inc. secretly owned and controlled by Kiritchenko in the interests of Lazarenko and about their money laundering conspiracy. UTICo's counsel was allowed to be present at the questioning of the Panamanian offshore agent who provided valuable testimony identifying Kiritchenko operating out of San Francisco.

20. Similar investigatory missions or activities were accomplished by UTICo and its counsel, per requests from the Prosecutor General's Office, in the Bahamas, but at the time of UTICo's meeting with the Attorney General of the Bahamas in November of 1998, as it was established later, Lazarenko's assets (for about $96 million) had been withdrawn shortly before, but those same assets were blocked, after tracing one more step of money laundering, later in the course of freezing EUROFED bank, registered in Antigua.

21. Additional missions were accomplished, again, in the British Virgin Islands. Discovery was accomplished in Barbados and elsewhere. Various Powers of Attorney issued by the Prosecutor General of Ukraine for UTICo and its counsel for discovery work in a number offshore jurisdictions, i.e. the British Virgin Islands, Panama, The Bahamas, and Barbados, have been produced in this action, none has been contested by Defendants. For representatives Powers of Attorney issued by the Prosecutor General of Ukraine

for UTICo and its counsel for work, for example in the British Virgin Islands and in Panama, fully implemented, see an aggregated **EXHIBITS 8, 9**.

22. In late 1998 and early 1999, UTICo located and identified several real properties, beneficially owned by the defendants in Northern California, and prepared a lawsuit against Kiritchenko for recovery of those real properties, pursuant to UTICo's rights under the Agreement with Ukraine of May 1998.

23. On February 19, 1999 Lazarenko, who came to the U.S. with visa irregularities trying to seek political asylum, was detained at the J.F. Kennedy airport in New York. From that point, UTICo's preparatory work for litigation in the U.S. contemplated a joint action against both key co-conspirators, Kiritchenko and Lazarenko. Being without knowledge if Lazarenko could be deported from U.S. any day or any hour, UTICo urgently (within 72 hours) prepared the first civil complaint against him, to assure obtaining federal jurisdiction over him.

24. When Lazarenko was in the immigration detention in New York for about 3 days, on February 22, 1999 UTICo filed an action against him in U.S. District Court for Massachusetts, docket #99CV10399. When UTICo identified that Lazarenko was held in the INS detention center in Jamaica, New York, UTICo repeatedly attempted to serve him, but Lazarenko refused to meet any visitors and refused to be served. For the letter to Sheriff with the request to serve, dated March 1, 1999 and the complaint, see

EXHIBIT 10. An analogous action was filed against Kiritchenko on March 16, 1999. For the true and correct copy of the complaint against Kiritchenko, see **EXHIBIT 11**.

25. Lazarenko moved to be transferred, and was transferred, to another detention center, close to San Francisco. Because the realty was in California, UTICo elected not to pursue service on him of the summons issued in Boston, but to file a new action in San Francisco. UTICo decided to consolidate actions against Lazarenko and Kiritchenko with obtaining supplemental instruments from Ukraine, in addition to UTICo's rights under the May 1998 Agreement and UTICo's own claims, and to prepare filing a joint action against both in San Francisco.

26. On April 13, 1999, Ukraine issued a Brief of Amicus Curiae (in preparation of this civil action), executed by Deputy Prosecutor General Mikola Obihod. That pleading enumerated the properties that UTICo had located. The Brief of Amicus was broadly construed to allow UTICo to assert its contractual interest under its Agreement with Ukraine. For the true and correct copy of the PGO's document #12-1101597, along with the PGO's translation, see **EXHIBIT 12**. This document, the original set being in UTICo's possession, has not been contested by any defendants.

27. The Brief of Amicus, confirmed UTICo's own claims to have priority. Namely, the Brief said (at p. 11): *"The Prosecutor General's Office seeks to*

entrust UTICo to represent its interests in the Court in order to effect further proceedings in regard to returning to Ukraine the property exceeding the amount awarded to the benefit of UTICo".

28. The Brief of Amicus was prepared in two originals, for U.S. District Court in San Francisco, being then in progress of preparation; the other original set was issued for the ongoing case in U.S. District Court for Massachusetts, UTICo's action against Lazarenko's kickback instrumentality UESU, Docket #97cv12180, the judgment in which is addressed below.

29. On April 30, 1999, Prosecutor General of Ukraine Mikhailo Potebenko signed the Power of Attorney to UTICo to organize and stage legal actions in the U.S. for recovering the assets of Lazarenko and Kiritchenko and of their co-conspirators. For the true and correct copy of the PGO's document #1211015-97, along with the PGO's translation, see **EXHIBIT 13**. This document, the originals in two duplicate documents and PGO's translation, all being in UTICo's possession, has been admitted by defendants.

30. UTICo continued to implement various investigatory missions for the Prosecutor General's Office including UTICo's contacts with Attorneys Generals in several Carribean [sic] jurisdictions. For a representative Power of Attorney, to the British Virgin Islands, dated June 26, 1999, see **EXHIBIT 14**. The mission outlined in that Power of Attorney was also successfully implemented by UTICo, with search and

discovery made per orders of a local High Court, obtained by UTICo in that jurisdiction.

31. When the action was being prepared based on the Power of Attorney, UTICo suggested in May of 1999 to Ukraine to become the plaintiff in the civil action undertaking all costs and risks, with UTICo's qualifying to the contractual "finder's fee" of 12% under the May 1998 Agreement. On about May 29, 1999, UTICo was advised that Ukraine could not become a plaintiff in the USA. Against the alternative that all realty assets would remain to the benefit of Lazarenko and Kiritchenko, in the ensuing talks, it was orally agreed that UTICo had the Assignment to file the action, with full interest in it transferred to UTICo, with a written confirmation to be issued upon evidence of the action actually filed.

32. On June 24, 1999, UTICo filed this action and recorded *lis pendens*, to immediately tie up 8 real properties in Northern California that it had discovered and identified. *Lis pendens* were later replaced by attachments by orders of this Court. UTICo informed Ukraine on the initiation of action and requested in a cover letter to the proposed Assignment instrument, to confirm the Assignment in writing, that in the event of UTICo's prevailing in the present action, no Ukrainian claims should be made to UTICo's possible recovery, which should all be used towards what Ukraine owed to UTICo for prior worldwide work.

33. As a demonstration that both UTICo and PGO were of the same understanding of the issues and what was a scope of the assignment, PGO faxed to UTICo on July 13, 1999 a Memorandum obtained by PGO upon search at the place of one of Kiritchenko's associates in Ukraine. When absconding from Ukraine, Kiritchenko abandoned that Memorandum, describing a money laundering scheme to conceal assets in California realty. For a true and correct copy of that Memorandum, written by one of Kiritchenko's attorneys to him and to his co-conspirator A. Liverant, see **EXHIBIT 15**.

34. On August 11, 1999, on behalf of the Prosecutor General, the Deputy Prosecutor General executed the Assignment instrument to UTICo (hereinafter the "Assignment"), based upon UTICo's proposed draft, expanded in Ukraine, that stated in the relevant part, after enumerating the properties: " . . . *we confirm the consent that the Ukraine side assigns the material claims upon the real estate property mentioned above to the firm UTICo in such amounts in which you will be able to prove the unlawful ownership thereof in your U.S. District Court*". For a true and correct copy of the PGO's document #06-11015/97, along with Plaintiff's and the PGO's translations, see **EXHIBIT 16**.

35. The Assignment recognized in its text body that it was issued for value, stating: "*Taking into consideration the work accomplished by, and the assistance from, your company as well as the civil law suit by UTICo* . . . ". The consideration stated in the

instrument took into account that more than $140 million of Lazarenko's assets were confirmed frozen in Guernsey by that time, and UTICo provided evidence of exceptional value for the prosecution and for recovery of other assets. The Assignment instrument has been admitted by defendants, see **EXHIBIT 16**.

36. In November of 1999, UTICo undertook a series of activities as well as the motions in this action targeting to freeze the assets of EUROFED bank, incorporated in Antigua. UTICo investigated and discovered that EUROFED bank was secretly co-owned by Lazarenko and Kiritchenko. Several Court Orders in this action towards temporary injunction referred in this action (Docket Nos. 133-140, 165, 213-215, 221-227, 286, 304, 331, 488-495, et al.).

37. Despite the initial temporary protective order that UTICo obtained and a scheduled hearing, the undisclosed EUROFED's assets in the U.S., about $79 million, were at that time secretly siphoned from San Francisco to Antigua by the Antiguan receivers-liquidators. Those offshore receivers-liquidators, hastily appointed by the then local Antiguan administration controlled by Lester Bird and his family members, with the objective to confiscate those assets. Those transfers to Antigua were made despite this Court's several orders freezing those accounts.

38. The last portion of about $1.3 million on EUROFED accounts in the U.S. that the Antiguan receivers-liquidators were unable to transfer quickly to Antigua, became frozen in San Francisco in November of 1999.

A EUROFED account, containing $5 million frozen in St. Kitts, and another account, containing about $29 million, was blocked in Lithuania, upon UTICo's attorneys urgently putting on legal notice the respective banks in St. Kitts and in Lithuania.

39. In December of 1999 and in January of 2000, UTICo's attorneys were able to cause Barclays Bank to transfer about $79 million, originated in San Francisco, from Antigua to London, Barclays bank headquarters, for safekeeping. However, 18 days later, the then Antiguan government headed by Lester Bird threatened Barclays Bank with confiscating all Barclays bank's assets in Antigua and jailing the local Barclays office manager unless those proceeds were wired from London to Antigua within 24 hours, which was under duress done by Barclays bank.

40. Even though the $79 million from San Francisco and $5 million from St. Kitts ended up in Antigua, the local attempts to confiscate those assets for Antiguan administration were resisted by UTICo, as well as by other parties. As a result of the activities initiated by UTICo, the following amounts of EUROFED bank assets were ultimately blocked: about $85 million in Antigua, $29 million in Lithuania, $1.3 million in the U.S., all of which were almost entirely on Lazarenko's 6 offshore sub-accounts at EUROFED. The Antiguan administration under Lester Bird attempted to confiscate all those proceeds in July of 2000. UTICo, again, acted diligently to prevent confiscation, including bringing attention of this Court. Such confiscation was ultimately stopped by the order

of Eastern Caribbean Court of Appeals located in St. Lucia.

41. In the light that UTICo was preparing its file for Suharto's misappropriated assets recovery project, on March 15, 2000, a Deputy Prosecutor General of Ukraine issued a letter of recommendation acknowledging UTICo's assistance to Ukraine. For a true and correct copy of that letter, the PGO's outgoing #6/1, **EXHIBIT 17**, used at meetings with the Attorney General of Indonesia in Jakarta in April of 2000.

42. As co-products based in part on the evidence and discoveries obtained by UTICo, Lazarenko's assets in Liechtenstein and in Austria were also frozen, bringing the total of frozen amounts in various jurisdictions to at least $350 million. UTICo believes that the total on the frozen accounts containing criminal assets is greater, but discovery of the certain accounts is not yet available. For example, the assets obtained jointly by Lazarenko and Kiritchenko, were cited to be about $880 million, according to Swiss experts testifying at Lazarenko's trial in Geneva in 2000 in his *absentia*; with whose assessment UTICo agrees.

43. I am aware that Kiritchenko commissioned his attorneys several times to travel to meet with PGO officials in 2000-2002 offering $7 million and his testimony for a plea bargain and for release of the Ukraine's civil claims against him remaining after 1999 assignment. In February of 2001, Kiritchenko's attorney Stan Roman traveled to Kyiv, committed

Kiritchenko's answering questions on Ukrainian Letter Rogatory and to pay $7 million.

44. As I am informed, Mr. Roman improperly offered $7 million only on the condition that the then Deputy Prosecutor General Nikolai Obihod signed an Affidavit that he had drafted for him. While Kiritchenko's deposition indeed took place in April of 2001, thereupon the attempted plea bargain unraveled because Kiritchenko failed to pay $7 million and because Kiritchenko failed to satisfy PGO's condition of not being involved in murders.

45. With regard to Exhibit 1 to Stan Roman's Affidavit, I am informed that PGO has disavowed Mr. Roman's using that Affidavit, that he was unable to obtain its renewal. Plaintiff objects to the admissibility of Nikolai Obihod's affidavit, except for verification of exhibits thereto, without his necessary deposition. The subsequent statements by the subsequent Prosecutor General Sviatoslav Piskun and subsequent Deputy Prosecutors General Viktor Kudriavtsev superseded with their statements that 5-year old Affidavit, which plaintiff requests to deem inadmissible without deposition. At the same time, plaintiff submits that Kiritchenko's offers of $7 million and paper trail represent estoppel against him, admitting the powers of PGO to release, assign, and contract upon, claims of Ukraine.

46. On June 25, 2002, the president of Ukraine issued a Decree No. 581/2002 entitled 'On the Procedure for Protection of Rights and Interests of Ukraine

During Litigation in Foreign Judicial Bodies", with the Annex "Procedure" issued by the head of the president's Administration (equivalent to an executive order in the U.S.). See **EXHIBIT 18**. Using that presidential Decree, the PGO applied before the Cabinet of Ministers to be formally appointed as the leading government organization on Ukraine side, with regard to the issues of Kiritchenko's and Lazarenko's assets, with accomplishing the ratification procedure as to the cooperation with UTICo.

47. On June 25, 2003, the PGO applied to the Cabinet of Ministers of Ukraine for the designation of the PGO as the leading government body, pursuant to the above presidential Decree No. 581/2002, with regard to continuing and organizing the actions towards the assets illegally obtained by Kiritchenko and Lazarenko, the PGO's outgoing No. 08/1/1-11015-97.

48. On June 30, 2003, the Cabinet of Ministers issued its Ordinance No. 38192, by which it ordered several government departments to come up with their opinions on the issue submitted by the PGO in its application of June 25, 2003. On July 7, 2003, the Ministry of Foreign Affairs of Ukraine issued a ratification letter covering the PLO's activities regarding Lazarenko, in support of appointing the PGO as a leading government body for those matters. For the true and correct copy of the Ministry of Foreign Affairs document #614/14-630-1095, see **EXHIBIT 19**.

49. On July 9, 2003, the Ministry of Justice of Ukraine informed the Cabinet of Ministers of Ukraine that it had no objections to appointing the PGO as the leading government body as to those issues. For the true and correct copy of the Ministry of Justice document #29-9-5697, see **EXHIBIT 20**.

50. On July 19, 2003 the Cabinet of Ministers of Ukraine issued its Ordinance No. 81506 by which it approved, endorsed and ratified the activities of the PGO with regard to Kiritchenko and Lazarenko including the PGO's contracting with UTICo. That Ordinance was signed, for the Prime Minister, by his First Deputy who simultaneously held the portfolio of the Minister of Finance, which meant that the Ministry of Finance also ratified and endorsed the PGO's activities.

51. That Ordinance of the Cabinet of Ministers of Ukraine was addressed to the Prosecutor General, the Minister of Justice, the Minister of Foreign Affairs, and, for information, also the Chairman of Supreme Court of Ukraine. The ordinance, together with the handwritten note by the Prosecutor General, contained the names of 9 Ukrainian officials of the highest rank appearing on that instrument. For the true and correct copy of the Cabinet of Ministers Ordinance #81506, see **EXHIBIT 21**.

52. On September 15, 2003, Prosecutor General S.M. Piskun wrote to the then president of Ukraine on UTICo's assistance and related issues, in particular that *"through the assistance of the firm UTICo,*

money of Lazarenko P.I. was located ad [sic] blocked for the amount of more than $276 million in the banks of Guernsey, Antigua, and of other countries." For that letter to the Ukrainian president, under the PGO's outgoing #08/1/111015-97, see **EXHIBIT 22**.

53. In response to the Prosecutor General's letter, the Administration of the Ukrainian President (roughly the equivalent of the White House staff) issued its letter of acknowledgment directed to the Minister of Justice, dated October 2, 2003. For the true and correct copy of the letter of the presidential administration, outgoing #31-01/1798, see **EXHIBIT 23**.

54. As evidence on consideration provided by UTICo, on October 17, 2003, Deputy Prosecutor General Viktor Kudriavtsev, issued the Additional Application filed at the Court in the local Kiritchenko's action in his *absentia*, upon the new circumstances. The pleadings made the assertion that there was the Agreement between the PGO and UTICo and that UTICo had fulfilled it.

55. That Additional Application said in its pertinent part: *"Between the Prosecutor General's Office and the firm UTICo, there has been . . . the commission Agreement. . . . The Power of Attorney No. 12-11015.97 of April 30, 1999 determined the subject and the scope of works that the entrusted party, the firm UTICo, was to undertake. The instrument No. 06-11015/97 of August 11, 1999 determined* the order of the settlement for the work by the firm UTICo. The firm UTICo, in accordance with the powers given to it, embarked on

accomplishing those works, it accomplished those works in the complete volume, by virtue of which . . . that Agreement is deemed accomplished." For a true and correct copy, the PGO's outgoing #02/5/1-11015-97, see **EXHIBIT 24**.

56. On February 2, 2004, Deputy Prosecutor General Olga Kolinko issued another Additional Application at the Ukrainian Court in the local action of fugitive from Ukrainian justice Kiritchenko, in particular pointing to the lack of service on UTICo and to the invalidity of Kiritchenko's local action without such service. For a true and correct copy of the PGO's document, outgoing #02/5/1-11015-97, see **EXHIBIT 25**.

57. In sum, in support of UTICo's standing or acknowledging it, the Ukrainian official instruments and documents were issued and signed by: -(a) two Prosecutors General of Ukraine [M.O. Potebenko and S.M. Piskun]; -(b) Acting Prosecutor General of Ukraine [B. Ferents]; -(c) four Deputy Prosecutors General [M.S. Obikhod, V.V. Kudriavtsev, O.V. Kolinko, M.Y. Golomsha]; -(d) Minister of Justice [O.V. Lavrinovich]; -(e) Deputy State Secretary for Foreign Affairs [O.F. Mosik]; -(f) Prime Minister [V.F. Yanukovich], executed for him by First Deputy Prime Minister [V.Y. Azarov] who was also simultaneously Minister of Finance; -(g) First Deputy Head of the President's Administration [Y. Zagorodny]. Inclusive the above enumerated documents, altogether there has been issued at least 25 Ukrainian government official

documents in which the PGO's 1998 Agreement with UTICo and its 1999 Assignment were acknowledged, ratified, endorsed or confirmed issued by various governmental offices at various times.

58. UTICo asserts that the instruments of the Prosecutor General's Office, acting for Ukraine, issued to UTICo in 1998-1999 fell within the Acts of State doctrine, in its most elaborate implementation. As to the internal process in that country, various key government offices and departments (altogether 6 or more) jointly approved, ratified and endorsed those acts.

Plaintiff Subject Only to U.S. Jurisdiction

59. With regard to Lazarenko and Kiritchenko, two fugitives from Ukrainian justice, who abused process and in their *absentia* used fraud in Ukrainian courts, on March 2, 2004, I wrote to the First Deputy Prosecutor General of Ukraine, confirming that UTICo is not subject to the jurisdiction of any courts in Ukraine. For a true and correct copy of my letter, with counsel's cover letter, see **EXHIBIT 26**, that has been duly produced to defendants. In particular, I emphasized that UTICo, a Massachusetts corporation, does not have a representative office in Ukraine and the scope of UTICo's 1998 Agreement with Ukraine was accompliahed [sic] only outside of Ukraine, primarily in the USA (as well as in the offshore jurisdictions in the Caribbean, the Channel Islands). Ukrainian authorities have never objected to my assertion of no jurisdiction in their local courts.

60. At all times, UTICo has relied on that UTICo is governed only by American law, which included the following facts: -(a) All instruments from the PGO were addressed to UTICo's address in the U.S., delivered by courier service or in person to the USA; -(b) The verbiage in the Assignment referred to U.S. District Court where UTICo would have to prove the claims, in such amounts as it could, implying that the federal law in the United States was to be applied; -(c) UTICo's executive directors have had all the talks with the officials of the PGO, the Ministry of Justice and of the Embassy in the USA; -(d) On every occasion of visits of the Ukrainian officials to the U.S., UTICo and its attorneys discussed with them the impact of the federal laws; -(e) Ukrainian law did not preview pre-judgment attachment by the law enforcement of properties of corporations; -(f) Ukraine has always treated civil actions in the U.S. as offered and implemented by Americans; -(g) Ukraine was advised about the statute of limitations, UTICo offered to Ukraine to become first plaintiff, but Ukraine took the informed decision to maintain the contractual and Assignment *status quo*.

61. UTICo has been guided with regard to its work for Ukraine by American law of contract, as well as by the relevant domestic legislation with regard to collection of assets, for example, the Federal Claims Collection Act (31 U.S.C. §3711 *et seq.*)

Fugitives' Abusing Process *in Absentia* in Foreign Courts

62. UTICo became aware, only after the Ukrainian "judgments" were issued, that Kiritchenko and Lazarenko filed their Ukrainian actions against the PGO in March and in July of 2003 respectively, designating UTICo as a 'third person' but without service on UTICo. Kiritchenko's challenge *in absentia* in Ukrainian courts was narrow: whether or not the PGO had the local statutory powers to issue powers of attorney and Assignments in their own country, the scope being only the local Ukrainian law. Lazarenko's challenge *in absentia* was without relation to the U.S.: whether the PGO had violated his constitutional rights to own the realty (bought for stolen money) and to his privacy in the USA. The PGO rebutted, including by undertaking various applications before the Cabinet of Ministers and other offices of the Ukrainian government to ratify and endorse its activities against Lazarenko and Kiritchenko. The PGO used for ratification of its acts the presidential Decree No. 581/2002.

63. UTICo asserts that the local actions by fugitives Kiritchenko and Lazarenko in their absentia in Ukrainian courts against the Prosecutor General's Office with regard to two instruments of UTICo of 1999 were nil for the following reasons: -(a) UTICo has never been served from Ukrainian courts with any summons or complaints; -(b) Service could have been made only under the Hague Service Convention for Civil and Commercial Matters, to which

Convention Ukraine is a party; -(c) The Ukrainian courts had no jurisdiction over UTICo or over the subject matter of the claims in the USA that had been assigned in a completed transaction, under American law in 1999; -(d) Kiritchenko's and Lazarenko's actions in Ukraine were incompatible with due process, i.e. neither made himself available to be deposed in those actions in which they made *in absentia* patent misrepresentations and concealment; -(e) Those actions of Kiritchenko and Lazarenko were invalid under the fugitive disentitlement doctrine, both have been wanted by Ukraine and by Interpol; -(f) There was appearance of fraud, on information and belief, caused by bribery, in the dockets of Kiritchenko's and Lazarenko's Ukrainian actions. -(g) In particular, the purported summons in Ukrainian language sent 6 days before the hearing to the USA to an address that does not exist in Boston, the package being returned back to the court, yet the local judge fraudulently wrote that UTICo was served; as well as numerous other badges of fraud in the Ukrainian dockets.

64. Despite all efforts of Kiritchenko in Ukrainian courts, on February 17, 2005, the Supreme Court of Ukraine issued a ruling that in its pertinent part confirmed the final dismissal of Kiritchenko's action. Kiritchenko lost his action *in absentia* against the PGO in Ukraine, even concealing the relevant contractual documents.

65. Lazarenko's local action in Ukraine is, on information and belief, still in progress. As to Lazarenko's challenge, it was without subject matter jurisdiction

because Lazarenko claimed his Ukrainian constitutional rights to U.S. based real property and to privacy were violated, which rights (to the stolen property) Lazarenko does not have in the U.S., especially after he is convicted of the money laundering felonies. The subject matter of Lazarenko's action is without jurisdiction and does not concern UTICo which had implemented the Agreement with Ukraine and accepted the Assignment of the claims in the USA for value in 1999, under American law.

66. After the election of a new president in December of 2004, UTICo's relationship with the PGO has remained unchanged, including in a representative pleading of the PGO in local courts dated August 5, 2005. Among other, the PGO has maintained all its criminal charges against Lazarenko, including the charges of Lazarenko's contracting murders.

67. Neither Kiritchenko nor Lazarenko have attempted to attack the base Agreement of May 14, 1998, and the additional instrument on October 2, 1998, with reference to **EXHIBITS 4, 5, 7**. After October of 2003, when Ukraine stated that the base Agreement had been deemed executed by UTICo, defendants have lost any legal ground to attack UTICo's rights to the benefits arising from UTICo's implemented the Agreement. Plaintiff asserts that UTICo has immediate rights to, at a minimum, $36.6 million from the frozen converted assets, recoverable in this action.

68. The validity of the 1998 Agreement and of the 1999 Assignment from Ukraine is also underscored by the fact that the statute of limitations subsequently ran for Ukraine to initiate actions against Lazarenko and Kiritchenko in the U.S. The criminal cases against both were opened in Ukraine in December of 1997, and the 4-year statute of limitations applicable to RICO actions ran for Ukraine in December of 2001.

69. At all relevant times, UTICo has been in contact with appropriate authorities. For example, UTICo briefed, before his confirmation by Senate, the newly appointed U.S. Ambassador to Ukraine on its work for the Prosecutor General's Office and entertained other contacts with the State Department in Washington, D.C. As another example, UTICo's attorneys communicated with the office of the FBI Director for facilitating a meeting with him of the Prosecutor General of Ukraine, per the latter's request.

70. On various occasions, UTICo offered to Ukraine to use to the fullest the personal jurisdiction of this U.S. District Court over the defendants and UTICo offered to Ukraine the spot of the first plaintiff in this action, with UTICo becoming the second plaintiff, for the purpose of the expansion of the claims on all the assets of the RICO conspirators worldwide, in addition to the claims related to the U.S. UTICo repeatedly advised Ukraine of the statute of limitations. The Ukrainian side has been standing by its decisions not to litigate as a party in the USA, acknowledging the 1998 Agreement and the 1999 Assignment as the efficient vehicles corresponding to Ukraine's interests.

71. As mentioned above, UTICo's claim against UESU and its key principal and beneficiary Lazarenko, litigated in the U.S. District Court for Massachusetts since 1997, UESU v. UTICo, #97cv12180, was ultimately reduced, after defaults of UESU and evidence of culpable conduct by UESU, to a default judgment for UTICo in the amount of $18,344,480, entered on July 7, 2005.

72. **EXHIBIT 27** represents a true and correct copy of said judgment. In that action UTICo pled that UESU, a RICO instrumentality, had been rendered defunct by its principals and beneficiaries, Lazarenko and others, to defraud creditors and that UTICo was seeking to redeem that judgment, among other, from Lazarenko's clandestine criminal assets, under the Uniform Fraudulent Transfer Act.

73. UTICo submits this judgment from another U.S. District Court in supplemental evidence for overwhelming showing of UTICo's standing in this action with regard to Lazarenko's corporate *alter egos* for fraudulent transfers, including defendant Dugsbery Inc. that was recipient of UESU proceeds through UESU's kickbacks to Lazarenko.

74. Representations by Kiritchenko that there was finality in his and Lazarenko's Ukrainian matters in their absentia were incorrect. For example, in the latest instance, PGO filed an appellate brief to the Supreme Court, dated August 5, 2005. For a true and correct copy thereof, see **EXHIBIT 28**. On information and belief, upon the sentencing of Kiritchenko

and Lazarenko, PGO will file supplemental briefs in local courts, to establish the correct record that neither of two convicts in the USA had the right to any redress in absentia while serving sentences in the USA, upon their felony convictions in the USA.

I declare under penalty of perjury under the laws of the United States of America that the foregoing Affidavit is true and correct.

Dated: JANUARY 12, 2006

/s/ W. Scott Thompson
W. Scott Thompson, D.Phil.

Chairman of the Board,
Universal Trading &
Investment Co.

Exhibit No. 12

Translation

Coat of Arms of Ukraine
Prosecutor's Office

Prosecutor General's Office of Ukraine

01011, Kyiv-11, Riznitska St., 13/15

April 13, 1999
Outgoing # 12-11015-97

To the U.S. Court in the United States of America
To Whom It May Concern

The present statement of Amicus Curiae is filed per request of Universal Trading & Investment Co. (UTICo.), USA, in connection with the lawsuit of UTICo. against Ukrainian citizen Kiritchenko, Petro Mikolaiovich.

At the request of the plaintiff UTICo. we hereby inform the esteemed Court on the following.

The Prosecutor General's Office of Ukraine investigates the criminal case No 49-800. The subject of the investigation in this Case is the misappropriation of the State property in especially large scale and committing of other crimes by the citizens of Ukraine: P.M. Kiritchenko, P.I. Lazarenko, M.I. Agafonov and other persons.

Between September 14, 1995 and July 12, 1996 P.M. Kiritchenko carried out on unsalaried status the duties of the advisor to the First Vice Prime Minister, and from July 12, 1996 through July 3, 1997 to the Prime Minister of Ukraine P.I. Lazarenko. Lazarenko

occupied the following positions: from March 1992 through June 1994 he was the representative of the President of Ukraine in Dnipropetrovsk region. From June 1994 through July 1995 Lazarenko was the head of the Regional Council of People's Deputies. From July 1995 through September 1995 Lazarenko was the head of the Regional Administration of Dnipropetrovsk region. From September 1995 through May 1996 Lazarenko was the First vice Prime Minister of Ukraine. From May 1996 through July 1997 P.I. Lazarenko was the Prime Minister of Ukraine.

While being in civil service and occupying a responsible official position P.I. Lazarenko acted illegally together with the resident of Dnipropetrovsk P.M. Kiritchenko, they have been the co-owners in **Bainfield Co. Ltd.,** registered in Tortola, the British Virgin Islands. (Lazarenko's stake in Bainfield is 51 percent of shares.) Further, he acted illegally together with M.I. Agafonov, director of the State farm **Naukovy** (Taromske, Dnipropetrovsk region), with the director general of closed corporation **Lucky** (Kyiv) and simultaneously the representative of a Panama-registered **GHP Corporation** I.O. Polozhentsev, as well as with the head of the Support Directorate of the Cabinet of Ministers of Ukraine P.A. Shkudun. Namely, in 1993-1997, contrary to the interests of the civil service and of the State, in conspiracy with the above persons. Lazarenko misappropriated the State funds in foreign currency in especially large scale. Lazarenko abused his official position contrary to the interests of the civil service, with premeditation and mens rea, causing substantial damage to the

interests of the State, illegally opened and used currency accounts outside of Ukraine, where he concealed the misappropriated from the State funds and revenues from various trading and financial operations.

P.M. Kiritchenko, in particular, is charged with the committing the crimes previewed by Articles 86-1, 222 part 1 of the Criminal Code of Ukraine, which read:

Article 86-1. Misappropriation of State or Public Property in Especially Large Scale.

"Misappropriation of State or public property in especially large scale, irrespective of the method of misappropriation (Articles 81-84 and 86) – is punishable by the deprivation of freedom for the period of time from 10 to 15 years with confiscation of property."

Article 222. Illegal Carrying, Keeping, Acquiring, Producing and Selling of Fire or Side Arms, Ammunition, and Explosives.

"Carrying, keeping, acquiring, producing or selling of the fire arms (with the exception of smooth-bore hunting ones), ammunition or explosives without due permission, – are punishable by the deprivation of freedom for the period of time from 2 to 7 years.

The person who voluntarily surrendered the fire arm, ammunition and explosives, which he kept without a proper permission is relieved from the criminal liability.

Carrying, producing or selling of daggers, Finnish knives or any other side arms without due permission, –
are punishable by deprivation of freedom for up to five years or by correctional labor for the period of up to two years."

P.M. Kiritchenko has committed the crimes, which he is charged with, under the following circumstances:

I.

In 1992-1995, a government-owned Ukrainian enterprise, the State farm **Naukovy** (Dnipropetrovsk region) sold MnSi (manganese silicate) and metal products to foreign companies. Per instructions of the director general of that government-owned enterprise M.I. Agafonov, the payments for those products were effected by foreign companies-buyers to the account No. 49.06.34.451 of **Van der Ploeg and Terpstra B.V.** (later renamed into **Van der Ploeg International B.V.**) at the **ABN-AMRO** bank in Leeuwarden (the Netherlands). M.I. Agafonov in fact controlled that account.

With the purpose of illegal concealment of the currency funds on foreign accounts and their further misappropriation, M.I. Agafonov concluded contracts with Mr. Rients Van der Ploeg, director of **Van der Ploeg and Terpstra B.V.** for the delivery of MnSi (manganese silicate) for $25,305,000 as a barter in exchange for heifers, spare parts for agricultural equipment, appliances for automatic milking, and 10

heavy trucks Kamaz of an equal value. M.I. Agafonov gave false information about the expenditure by the State farm **Naukovy** in the said contracts and in the addenda to those contracts. He showed inflated prices for heifers, agricultural equipment and appliances, comparing to real amounts spent in the Kingdom of Netherlands.

In 1993 – 1995 an amount of 34,558,199.75 US dollars was transferred from foreign buyers to the account of **Van der Ploeg and Terpstra B.V.** as payment for MnSi (manganese silicate) and metal products sold by the State farm Naukovy. M.I. Agafonov illegally concealed these funds at the account of that company from the government controlling bodies of Ukraine.

A part of those foreign currency funds in the amount of $14,524,712.97 was used by the State farm Naukovy for the acquisition of the cattle, of agricultural vehicles and equipment. However, the remainder in the amount of $20,033,486.78 US dollars was misappropriated by M.I. Agafonov and per his instruction was transferred to personal accounts of Ukrainian citizens in foreign banks, as well as those of foreign firms founded by Agafonov personally or registered in the name of his relatives and acquaintances in the Netherlands, Germany, Hungary, Ukraine, Switzerland, Canada, USA, and was used by M.I. Agafonov for his personal purposes.

Since M.I. Agafonov is the people's deputy of Ukraine, on October 27, 1998 the Prosecutor General

of Ukraine filed an application to the Verkhovna Rada (parliament) of Ukraine to grant consent for bringing M.I. Agafonov to criminal justice and for arresting him. Verkhovna Rada has not considered that application because M.I. Agafonov left Ukraine for medical treatment outside of Ukraine.

A part of the public funds misappropriated from the State farm **Naukovy** was transferred to the accounts of the firms belonging to P.M. Kiritchenko.

Thus, in 1993 an amount of $1,205,000 was transferred from the above mentioned account in **ABN-AMRO** bank, Leeuwarden, Netherlands to the account of **Naukovy** enterprise in the Hungarian **Posta Bank**, Zahoni, then to the account of **LIP Handel AG** in **UBS** (United Bank of Switzerland), Freiburg, Swiss Confederation. The account of **Naukovy** with **Posta Bank** was concealed from the controlling bodies of Ukraine. The owner of the above account of **LIP Handel AG** was the former representative of the President of Ukraine Pavlo Ivanovich Lazarenko, who then became the First vice Prime Minister and then the Prime Minister of Ukraine.

With the purpose of the subsequent laundering of proceeds from crime, P.I. Lazarenko in conspiracy with P.M. Kiritchenko transferred misappropriated from the Ukrainian State funds from the account of **LIP Handel AG** to the account No. 0037-06948 in the **Bank of America** for the benefit of **ABS Enterprises, Inc.,** USA, San Francisco, owned by Petro M. Kiritchenko.

On November 22, 1994, the amount of $6,014,000.00 misappropriated by M.I. Agafonov in the State farm Naukovy was transferred from the account with **ABN-AMRO** to the account No. 21383 with **Schweizerische Volksbank** (Geneva) belonging to **Orphin S.A.** registered in the Bahamas, and which director is Petro M. Kiritchenko.

The analysis of the obtained documents allows us to draw the conclusion that P.M. Kiritchenko in fact is the owner or one of the co-owners of **Orphin S.A.**

In particular, on October 27, 1993 Petro M. Kiritchenko personally opened banking account No. 024/10/61310/00 for **Orphin S.A.** with **American Bank in Poland**, Warsaw and he is still the only manager of that account.

Substantial amounts were transferred from this account to the personal accounts of Petro M. Kiritchenko, his wife and daughter, namely:

• On June 14, 1994, $900.000 [sic] were transferred to the personal account of P.M. Kiritchenko and his wife I.G. Kiritchenko No. 00331-01854 at the **Bank of America** in San Francisco. (Shortly after that transfer, on July 29, 1994, P.M. Kiritchenko acquired a house at the address: 406 Paradise Dr., Tiburon, CA 94920 with the assessment value of $810,900);

• On April 4, 1995, $208,000 were transferred to the personal account of P.M. Kiritchenko and his wife

I.G. Kiritchenko No. 00331-01854 at the **Bank of America** in San Francisco;

• On July 18, 1995, $650,000 were transferred to the personal account of P.M. Kiritchenko and his wife I.G. Kiritchenko # 00331-01854 at the **Bank of America** in San Francisco;

• On October 19, 1995, $20,000 were transferred to the personal account of the daughter of Petro M. Kiritchenko, Ludmila P. Kiritchenko No. 10719-03288 at the **Bank of America** in San Francisco.

• On November 13, 1995, $40,000 were transferred to the personal account of the daughter of Petro M. Kiritchenko, Ludmila P. Kiritchenko No. 10719-03288 at the **Bank of America** in San Francisco.

Total of $ 1,818,000.00 was transferred from the account of **Orphin S.A.** at the Polish bank to the personal accounts of P.M. Kiritchenko and the members of his family.

In that manner, P.M. Kiritchenko received $7,219,000 at the accounts of the firms, which belonged to him, namely **Orphin S.A.** and **ABS Enterprise, Inc.** This money is the part of the $20,033,486.78 misappropriated from the State farm **Naukovy.**

Part of the misappropriated in the State farm **Naukovy** funds in the amount of 6,972,000 US dollars was transferred to the personal account of

Pavlo I. Lazarenko No. 08-05785-3 KATO-82 at the **Bank Credit Lyonnais (Suisse) SA** (Zurich).

The personal connection between P.I. Lazarenko and P.M. Kiritchenko and his interest in accomplishing the above illegal transactions in the interests of P.M. Kiritchenko is confirmed in a number of documents received by the investigation from the law enforcement of other countries.

In particular, the evidence is provided by the letter petition by the former First Vice Prime Minister P.I. Lazarenko to the Minister of Justice of Republic of Poland of October 26, 1995 No. 8/2. Lazarenko requested to settle the criminal case in regard of P.M. Kiritchenko who was detained in that country under the suspicion in murder and was in the process of bringing him to justice for illegal acquisition and carrying of a fire arm.

The above is further proved by the documents received as Polish legal assistance from the **American Bank in Poland,** Warsaw, about the opening on January 13, 1993, by P.I. Lazarenko of his personal account No 00563/33066/00 and the transfer by P.M. Kiritchenko to the same account of $ 40 thousand on that same day. This transfer was effected from the account opened by the latter in the same bank on September 11, 1992, under the name of ASS Co. Ltd.

The above is further proved by the documents provided to Ukraine by the authorities of the British Virgin Islands as legal assistance. In accordance with those materials since January 6, 1995 Pavlo

Lazarenko and Petro Kiritchenko are co-owners of **Bainfield Co., Ltd.** (respectively 51 and 49 percent of shares) registered in Tortola, the British Virgin Islands. That company has an account No. 5383 in **SCS Alliance S.A.,** Geneva, Switzerland and that same company is the co-founder of the closed corporation with foreign investments **Dnipropetrovsk Beer and Non-Alcohol Combine Dnipro,** Ukraine, where it owns 61.7 percent of shares, whereas the remaining 38.3 percent belongs to 1562 citizens of Ukraine, i.e. other co-founders; thus it is engaged in trade and financial operations in Ukraine.

II.

In August 1995 Petro M. Kyrychenko, while using his office of Councilor to the First Vice Prime Minister of Ukraine Pavlo I. Lazarenko and being founder of Kyiv-based company **LUCKY** entered into conspiracy with Polozhentsev and Mr. O. Persianov, Deputy Minister for Agriculture and Provision of Ukraine. Thus by his resolution # 22-2-1-06/291 of September 28, 1995 Mr. O. Persianov obliged Mr. O. Stoiko, general director of Kirovograd State Manufacturing Association ELEVATORZERNOPROM to dispatch 110 thousand tons of wheat to private company **LUCKY** from state reserves allegedly for provisional needs of Dnipropetrovsk region. (Ihor O. Polozhentsev is a general director of LUCKY company and at the moment the Prosecutor General Office of Ukraine chose an arrest as a preventive punishment for him and declared a search of him.)

This resolution was illegal, since duties in regard of satisfying regional state needs with provisional grain are assigned to Central Department for Bread Products, which was specially set up for such purposes within Ministry for Agriculture and Provision of Ukraine. Such satisfaction of regional needs in grain is effected at minimum state prices exempted from tax and distribution costs, which are covered by the government.

In this case Kirovograd State Manufacturing Association ELEVATORZERNOPROM had to sell 110 115 tons of provisional wheat grain to **LUCKY** company, which actually belonged to private person Petro M. Kyrychenko. Such purchase was effected in compliance with above resolution of Deputy Minister O. Persianov and at minimum state price of 153,2 [sic] hryvnas (or 129,4 [sic] US dollars) per 1 ton for a total amount of 18 945 000 hryvnas (or 16 000 000 US dollars).

According to mentioned resolution of O. Persianov another state enterprise, namely Dnipropetrovsk Manufacturing Association ELEVATORZERNOPROM was able to purchase only 76 667,7 [sic] tons of the grain for 19 620 500 hryvnas (or 16 571 400 US dollars) from **LUCKY** company; since **LUCKY** sold the grain not under minimum state price but under market one of 256 hryvnas (or 216,2 [sic] US dollars) per 1 ton.

Thus, 33 400 tons of wheat grain (i.e. difference between 110 115 tons bought from the State and 76

667,7 [sic] tons of wheat grain sold by private company **LUCKY** to the State) were misappropriated from state resources in result of the above indicated criminal conspiracy. The value of misappropriated 33 400 tons of wheat grain is 7,875,100 hryvnas (or 6,651,300 US dollars) according to the act of documentary audit of September 17, 1998.

With the purpose of receiving the funds in foreign currency, P.M. Kiritchenko, through firm **Lucky** which had no license for export-import operations, arranged the sale of the part of the misappropriated wheat in the amount of 11,902 tons to his own firm **Agropostachzbut,** of Dnipropetrovsk, Ukraine belonging to him, which had the license to effect exports of wheat. That firm, **Agropostachzbut** organized the sales of the above-mentioned quantity of wheat to **Orphin S.A.,** the Bahamas, whose director and, in fact, owner was P.M. Kiritchenko. Later, **Orphin S.A.** effected the sales of 11,902 tons of wheat to the Polish firm **Agroimpex,** which effected a part of the payment for the acquired wheat in the amount of $1,771,848.45 transferred from July 5, 1996 through January 23, 1997 to the account of **Orphin S.A.** No. 024/10/61310/00 in the **American Bank in Poland,** Warsaw.

A part of the misappropriated funds was transferred from the account of **Orphin S.A.** in **American Bank in Poland,** Warsaw to the account of the U.S. based company **Brancross U.S. Holdings, Inc.** No. 107-14-07151 opened on March 27, 1997 in **Bank of**

America. The holders of rights on that account are P.M. Kiritchenko and his wife:

Date of payment from account of ORPHIN S.A.	**Amount in U.S. dollars**
• April 11, 1997	$400,000
• June 23, 1997	$300,000
• August 5, 1997	$350,000
• August 20, 1997	$350,000
Total:	**$1,400,000**

Corporation **Brancross U.S. Holdings, Inc.** was registered on March 12, 1997 in the administration of the Secretary of State of California. Its agent for service of process in the State of California is **CT Corporation System, Inc.** The corporation is authorized to issue 1'000'000 shares without par value.

In accordance with the documents of **Brancross U.S. Holdings, Inc.,** which it files to the administration of the Secretary of State of California:

• the main administrative and business office of the company is at the address: 1 Harbor Dr. Suite 102, Sansalito, CA 94965;

• the chief executive officer is Petro Kiritchenko, 406 Paradise Dr., Tiburon, CA 94920. He is also the head administrator of the company on financial matters;

• the secretary of the company is the wife of P.M. Kiritchenko, Izabella Kiritchenko.

Apart from the account in the **Bank of America, Brancross U.S. Holdings, Inc.** has also the account No. **H34-1006070** with **Hambrecht & Quist LLC,** which was opened by P.M. Kiritchenko on July 23, 1997 and where again Kiritchenko is the sole manager of the account.

On August 5, 1997 the amount of $3 million was transferred from the account of **Brancross U.S. Holdings, Inc.** at the **Bank of America,** No. 107-14-07151 to the above indicated account of **Brancross U.S. Holdings, Inc.** at **Hambrecht & Quist LLC;** this transaction was effected by check No. 376 signed by Izabella Kiritchenko. This account of **Brancross U.S. Holdings, Inc.** at **Hambrecht & Quist LLC** was used for acquisition of shares of various enterprises.

Brancross U.S. Holdings, Inc. established subsidiary companies, **BRC Property Holding** (where daughter of P.M. Kiritchenko, Ludmila Kiritchenko was the manager), and **Xanadu Property Holding.** These companies were registered on the same day, July 30, 1998 as Limited Liability Companies. Law Offices **PILLSBURY MADISON & SUTRO, LLP,** 235 Montgomery Street, San Francisco, CA 94104 represents these companies.

P.M. Kiritchenko also owns **Dugsbery Inc.** That company was registered on November 16, 1994 under No. 1895684 in the State of California. Petro Kiritchenko is this company agent for service of

process. The company was authorized to issue only one hundred of shares total of one type.

The statements of that company as of February 16, 1995 confirm that the main administrator, the secretary and the chief financial manager was Petro Kiritchenko.

The above facts show that P. M. Kiritchenko actually owns **Brancross U.S. Holdings, Inc.,** and its banking accounts; **Dugsbery, Inc;** and the companies with limited liabilities **BRC Property Holding and Xanadu Property Holdings.**

III.

In 1997, P.I. Lazarenko while working as Prime Minister of Ukraine and abusing his official duties in the interests of **GHP Corporation,** Panama (GHP corporation belonged to Petro M. Kiritchenko through figure-heads) gave an illegal order to his subordinates to conclude a contract at inflated prices with a representative of that firm Ukrainian citizen I.O. Polozhentsev for the acquisition of prefabricated cottages for the needs of the Cabinet of Ministers of Ukraine.

To implement that order, on January 27, 1997 a contract was concluded between the Support Directorate of the Cabinet of Ministers of Ukraine and **GHP Corporation** for the acquisition of 6 prefabricated cottages for the amount of 1,416,000 US dollars. That amount surplused [sic] their real price

by $891,237 US dollars. The Cabinet of Ministers of Ukraine transferred the amount of $1,416,000 to the account of that corporation.

In the process of implementation of that contract, the head of the Support Directorate of the Cabinet of Ministers of Ukraine P.A. Shkudun, who executed the orders of P.I. Lazarenko, together with the representative of that firm I.O. Polozhentsev concealed the real costs of those prefabricated houses, which was $524,763, while using falsified invoices. In that manner, the Cabinet of Ministers of Ukraine incurred losses for $891,237 as a result of the transfer of the government funds to the account of **GHP Corporation** as a payment against the contract at inflated prices for acquired cottages.

A part of the misappropriated in that manner funds from the Support Directorate of the Cabinet of Ministers of Ukraine in the amount of 5,000 Swiss Francs was transferred from the account of **GHP Corporation** on February 26, 1997 to the account of the Institute **Monte Rosa** in Switzerland for the tuition of the daughter of P.M. Kiritchenko – Lydia Petrivna Kiritchenko, born in 1982. Another payment with the same source, namely in the amount of $29,925, was transferred from March 24, 1997 through November 14, 1997 to the Kyiv-based KIVAR company for the repairs and reconstruction of the apartments owned by P.M. Kiritchenko in Kyiv.

At present time, P.A. Shkudun is brought to criminal responsibility in Ukraine by the Prosecutor

General's Office of Ukraine for that crime. I.O. Polozhentsev, P.M. Kiritchenko and P.I. Lazarenko are declared as persons sought through INTERPOL; and the Prosecutor General of Ukraine sanctioned their arrest for the commitment of the above and other crimes.

IV.

In addition, in 1995 P.M. Kiritchenko acquired illegally, kept and carried a firearm, revolver Astra without due permit on the territory of Poland. He was arrested for that by the Polish law enforcement on February 1, 1995 under suspicion in committing murder, however, as a result of the intervention of P.I. Lazarenko and of the officer of the Consular Directorate of the Ministry of Foreign Affairs of Ukraine, V.G. Koval, Kiritchenko was released from custody on bail. The materials of the criminal case on P.M. Kiritchenko, which were received by V.G. Koval for passing it to the Prosecutor General's Office of Ukraine, as well as evidence were destroyed by Koval. That is why P.M. Kiritchenko was not brought to criminal justice for that crime in Poland and Ukraine in time.

The Polish law enforcement bodies have renewed the criminal case in regard of the illegal acquisition, keeping, and carrying of the fire arm by P.M. Kiritchenko without a due permit on the territory of Poland, and passed it to the Prosecutor General's Office of Ukraine for bringing him to criminal justice

for the committing of the above crime previewed by the Article 222 part 1 of the Criminal Code of Ukraine.

The Swiss law enforcement which accords legal assistance to the investigation by the Prosecutor General's Office of Ukraine and which acts at its request, have attached the confirmed amounts for about $15 million which are the proceeds of crime. The attachment was effected upon the accounts of **GHP Corporation, Ltd.** and **Bainfield Co., Ltd.** in **Bank SCS Alliance S.A.** (Geneva), **Orphin S.A.** in **Schweizerische Volksbank** (Geneva) and other P.M. Kiritchenko's accounts in Swiss banks as of spring of 1998.

V.

At the present time, the Prosecutor General's Office of Ukraine conducts investigation of P.M. Kiritchenko's and P.I. Lazarenko's participation in the control over the capitals of Industrial and Financial Corporation **United Energy Systems of Ukraine** (below IFC UESU or UESU).

According to the conclusion of the investigation, P.M. Kiritchenko and P.I. Lazarenko controlled **United Energy Systems of Ukraine** and the revenues from its economic activities, doing this for personal gain and by mechanism of secret chain of holding shares, in particular through an off-shore company **Bassington, Ltd.** registered in the British Virgin Islands.

The activities of **UESU** in gas domain were audited by the Ministry of Finance of Ukraine in 1998 by its Central Controlling Auditing Directorate. Per its conclusions, on June 24, 1998, the State Tax Inspection of Ukraine issued the resolution No. 644/22/13418729/7279 on applying upon UESU of the financial sanction in the form of a fine for 1,443,531,134.92 hryvnas (about $704 million at the rate of exchange at that moment) as a punishment for violation of the provisions of the Ukrainian law No. 185/94 BP of September 29, 1994. There were confirmed the amounts of illegal transfers effected by **UESU** from Ukraine and the illegal transfers by the residents of Ukraine to the accounts of **United Energy International, Ltd.** beyond Ukraine for total equivalent of near $700 million.

Upon application of the Prosecutor General's Office of Ukraine, the Ministry for External Economic Relations and Trade of Ukraine determined in July 1998 that UESU was prohibited to be engaged in any external economic operations. Another resolution was issued in regard of **United Energy International, Ltd.,** London, which also prohibited this company to be engaged in any operations on the territory of Ukraine. These prohibitions were entered for a certain period of time.

The Supreme Arbitration Court of Ukraine, the highest judicial civil institution in Ukraine, to which **UESU** and **UEI** appealed upon the first ordinance of the ordinary Ukrainian court, determined in its judgment of October 15, 1998 that in the course of

concluding multi-billion dollar contracts for imports of gas, **UESU** has drawn **UEI** in these contracts without valid reasons and illegally changed the status of the ownership of the imported gas. That was the violation of the Ukrainian legislation. UESU channeled the monetary flow from Ukraine via **UEI** to London.

The controlling share in **UESU** belongs to **Bassington, Ltd.** through its subsidiary **United Energy International, Ltd.** This fact was concealed in Ukraine and became known to the investigation as result of the complex of investigation actions and of international legal assistance.

Upon rogatory-letter of the Prosecutor General's Office of Ukraine addressed to the Governor and to the authorities of the British Virgin Islands, the documents were confiscated in regard of **Bassington, Ltd.** per court ruling in Road Town. The confiscated documents showed that **Bassington, Ltd.** was a shelf company, incorporated on October 23, 1996 by the agent firm Mossack Fonseca and Co. for sale to its clients, as a turnkey company. On December 11, 1996 the Swiss trust bank **Credit Suisse Trust,** registered in the offshore jurisdiction of Guernsey acquired **Bassington Ltd.** The purchase was effected for anonymous client, beneficiary of the trust account in that bank. Per Power of Attorney the Bank became the owner of **Bassington, Ltd.** in the interests of its anonymous client. The directors of **Bassington, Ltd.** were the officers of that bank **Credit Suisse Trust,**

Guernsey, who subsequently were replaced by legal entity **Primary Management Ltd.**

At the present time, the Prosecutor General's Office of Ukraine conducts investigation and judicial actions through corresponding judicial bodies and with the foreign legal assistance in order to ascertain additional documentary evidence of the participation of P.M. Kiritchenko and P.I. Lazarenko in the off-shore holding scheme, through which they managed the capitals of UESU.

The investigation possesses information that P.M. Kiritchenko used the funds misappropriated from Ukraine for the acquisition of real property in the USA and in Ukraine, where he registered owned by him companies as front holders of the titles.

In particular, according to our information, Kiritchenko owns the following real estate property on the territory of the United States:

Property	Address	Acquisition date	Price	Title holder	Owner in fact
House of Kiritchenko family	185 Gilmartin Drive Tiburon, CA	February 1996	$4 mln	Brancross U.S. Holdings, Inc.	Kiritchenko
Land of the above situs	185 Gilmartin Drive Tiburon, CA	February 1996	$1.3 mln	Brancross U.S. Holdings, Inc.	Kiritchenko
House, where Kiritchenko family resided and currently his daughter resides	406 Paradise Drive Tiburon, CA	July 1994	$810,800 – at the moment of purchase; at present value is higher	Ludmila Kiritchenko and her husband Olexander Kiritchenko	Ludmila Kiritchenko and her husband Olexander Kiritchenko
Condominium	901-903 Pine Street San Francisco, CA	1999	$1.5 mln	Brancross U.S. Holdings	Kiritchenko
Condominium	3500 Fulton Street San Francisco, CA 94118	1999	$ 4 mln	Brancross U.S. Holdings	Kiritchenko
Parcel of land 26 acres	APN 39-241-01 in Tiburon, CA 94920	April 1998	$1.3 mln	Xanadu Property Holdings, affiliate of Brancross U.S. Holdings	Kiritchenko
Parcel of land 52 acres	APN: 058-071-01, 058-100-09 Tiburon, Marin County	May 1998	$2.8 mln	BRC Property Holdings, affiliate of Brancross U.S. Holdings	Kiritchenko

In addition, we have information that in September 1998 a house was purchased for the name of **Dugsbery, Inc.** for $6 million 750 thousand at the address: 100 Obertz Lane, Novato, CA, where the family of P.I. Lazarenko resides.

In that manner, P.M. Kiritchenko charged in crimes in absentia, owns the real estate in the USA for the total amount of $15 million 250 thousand.

According to operative information, P.M. Kiritchenko owns a vessel registered in County Marin, Greater San Francisco, with the assessed tax value of $ 94 thousand.

Per our information, the account of **Dugsbery Inc.** is ABA #: 121140218 No. 0506368109 at **West America Bank** (Sausalito, California, 94965).

Thus, proceeding from the above facts it could be seen that the real estate in the USA was acquired by P.M. Kiritchenko for the proceeds from crime and titles for such realty were registered on the companies which he owns: **Brancross U.S. Holdings, Inc.; Dugsbery, Inc.; BRC Property Holdings, LLC;** and **Xanadu Property Holdings, Inc.**

On February 17, 1999 Verkhovna Rada (parliament) of Ukraine granted the consent for bringing to criminal justice and arrest of P.I. Lazarenko who is presently the people's deputy (member of parliament) of Ukraine.

Attempting to escape criminal responsibility for the crimes as charged, P.I. Lazarenko left Ukraine on

the eve of February 17, 1999, using his parliamentary immunity. On February 19, 1999 he was detained at the airport of New York and is detained currently by the Immigration and Naturalization Service of the USA.

The Prosecutor General Office of Ukraine accuses Petro M. Kyrychenko in commitment of the crime determined in the Article 86[1] of the Criminal Code of Ukraine. Sanction of the Article 86[1] of the Criminal Code of Ukraine stipulates such punishment as confiscation of property. Besides, Petro M. Kyrychenko caused essential damage to the Ukrainian State in view of his criminal deeds. Ukrainian Penal Law of Procedure requires investigative institutions to take measures in order to file civil suit in the criminal case, as well as to take measures to ensure execution of court judgement in its part of possible confiscation of property. This requirement is contained in the Article 125 of the Ukrainian Penal Code of Procedure with such wording:

Article 125. ***The requirement to file civil suit and to ensure property confiscation stipulated by law.***

Upon request of civil plaintiff or on his/her own initiative, investigator is required to take measures to file civil suit declared in the criminal case as well as possible future civil suit by drawing up a resolution in this regard.

In the cases concerning crimes, which are punishable by property confiscation under criminal

legislation, investigator is required to take necessary measures by drawing up resolution in this respect before ensuring execution of judgement in its part of possible confiscation of property.

In connection with above and having all grounds to do so, the Prosecutor General Office of Ukraine supports suit of UTICo to attach all realty of Petro M. Kiritchenko on the territory of the USA, which was acquired by him for proceeds from crime and registered on the companies controlled by him.

The Prosecutor General Office of Ukraine seeks to entrust UTICo to represent its interests in the court in order to effect further proceedings in regard of returning to Ukraine the property exceeding the amount, awarded for the benefit of UTICo. In the above respect the Prosecutor General Office of Ukraine will forward additional documents to the court.

Deputy Prosecutor General of Ukraine

M. Obykhod

Translator of the Prosecutor General Office of Ukraine. D. Schur

/s/ D. Schur

[Seal Omitted]

Exhibit No. 16

Translation

Coat of Arms of Ukraine
Prosecutor's Office

Prosecutor General's Office of Ukraine

01011, Kyiv-11, Riznitska St., 13/15

11.08.99 (August 11, 1999)
Outgoing No. 06-11015/97

Y.A. Lambert
President of
Universal Trading & Investment Co. (UTICo)
33 Almont Street Winthrop-Boston MA 02152, USA

Dear Mr. Lambert !

Taking into consideration the work accomplished by, and the assistance from, your company as well as the civil law suit by UTICo in regard to the real estate property in the USA which possibly belongs to Ukrainian citizens P.M. Kiritchenko, members of his family, P.I. Lazarenko, and 4 Californian companies controlled by the above persons, namely: Dugsbery Inc., Brancross U.S. Holdings Inc., B.R.C. Property Holdings LLC, and Xanadu Property Holdings LLC, we confirm the consent that the Ukraine side assigns the material claims upon the real estate property mentioned above to the firm UTICo in such amounts in which you will be able to prove the unlawful ownership thereof in your U.S. District Court, with

the term that such amounts will be in the future credited into the amounts ought to be paid by the Ukraine side for your services, that is into the 12% of all funds returned to Ukraine from outside of its borders with the assistance of UTICo, as it was stipulated in the letters of the Prosecutor General's Office of Ukraine, outgoing No. 12-01379-97 of May 15, 1998, and No. 12-11015-97, of October 2, 1998.

Deputy Prosecutor General of Ukraine

Signed

M.S. Obihod

Stamp of Prosecutor General's Office of Ukraine with the National Coat of Arms of Ukraine

Exhibit No. 19

Translation

Coat of Arms of Ukraine
MINISTRY OF FOREIGN AFFAIRS OF UKRAINE
1 Mikhailovska Square
Kyiv, 01018, Ukraine
Tel. (38044) 238 1777 Fax 21222
Telex 131373 Rubin
e-mail: zsmfa@mfa.gov.ua
www.mfa.gov.ua
July 7, 2003, No. 614/14-630-1095

Ministry of Justice of Ukraine

URGENT!

With regard to recognizing the Prosecutor General's Office

As the responsible body in the matter of P. Lazarenko

On the basis of the Order of the Prime Minister of Ukraine V.F. Yanukovich No. 38192 dated June 30, 2003, be advised that the Ministry of Foreign Affairs of Ukraine, within its competence, does not object against the appointment of the Prosecutor General as the responsible body for organization and continuation of the actions aimed at protection of the material interests of the State in the matters regarding repatriation into Ukraine of assets of P.M. Kiritchenko and P.I. Lazarenko.

Deputy State Secretary O.F. Motsik
(Signature)

Certification of translation:

I, Roman Plyamovaty, verify under oath that I have the knowledge of the Ukrainian language, that I am a U.S. citizen, and that the above translation from Ukrainian into English of the contents is true and correct, to the best of my knowledge.

/s/ R. Plyamovaty
Roman Plyamovaty

Date: January 10, 2004

Exhibit No. 20

Translation

Coat of Arms of Ukraine

MINISTRY OF JUSTICE OF UKRAINE

Ukraine 0100, Kyiv
St. Horodetskogo, 13
Tel. (380-44) 229 6664
Fax (380-44) 229-5631

Date: July 7, 2003
No. 29-9-5697

To: PRIME MINISTER OF UKRAINE
Yanukovich V.F.

Re.: Implementing the order of
Cabinet of Ministers of Ukraine
dated June 30, 2003, No. 38192

Esteemed Viktor Fedorovich !

The Ministry of Justice of Ukraine, on the basis of the order of the Prime Minister of Ukraine dated June 30, 2003, No. 38192 has considered the letter of the Prosecutor General's Office of Ukraine dated June 25, 2003 No. 08/1/1-11015-97 with regard to appointing that body the responsible body for organization and continuation of the actions aimed at protecting the material interests of the State in the matters of repatriation into Ukraine of the property of Kiritchenko P.M. and Lazarenko P.I. and informs as follows.

Paragraph 6 of the Regulations for Protecting the Rights and Interests of Ukraine in the event of the consideration by foreign judicial bodies cases, established by the Decree of the President of Ukraine

dated June 25, 2002 No. 581 (thereinafter "Regulations"), states that the Cabinet of Ministers of Ukraine appoints the responsible body upon which the implementation of the coordination of the activities of the interested bodies and organizations with regard to protecting the rights and interests of Ukraine in foreign judicial bodies, as well as of legal and physical persons that are engaged for implementing such protection.

In accordance with Paragraph 14 of the Regulations with regard to events of consideration by foreign judicial bodies of the cases upon lawsuits (complaints, applications) of Ukraine as the State, of the President of Ukraine, of the Cabinet of Ministers of Ukraine, of the ministries, other central body of the executive power are to be implemented following Paragraphs 7-13 of said Regulations.

While being guided by Paragraphs 1, 2, 5, 6, 14 of the Regulations and by Articles 6, 17, 19, 116 of the Constitution of Ukraine, in compliance of the Ordinance of the President of Ukraine dated July 7, 2002 No. 306/2002-rn, the Ministry of Justice of Ukraine does not have grounds for objecting to the appointment of the Prosecutor General's Office of Ukraine as the responsible body in that matter.

The propositions and implementation of the organizational legal nature, of the procedural and other approaches for implementing protection of the interests of the State, including engaging juridical counselors, may be implemented within the

Intragovernmental Working Group that is to be established by the responsible body in accordance with Paragraph 9 of the Regulations and in accordance with the approved plan of the organizational approaches.

The Ministry of Justice of Ukraine does not object against the appointment of the Prosecutor General's Office of Ukraine to be the responsible body and organization for the continuation of the actions aimed at protecting the material interests of the State in the matters regarding to repatriating to Ukraine the assets of Kiritchenko P.M. and Lazarenko P.I.

The Ministry of Foreign Affairs of Ukraine also does not object to the appointment of the Prosecutor General's Office as the responsible body in that matter.

Annex: Instrument of the Ministry of Foreign Affairs dated July 7, 2003 No. 614/14-630-1095

With esteem,

Minister O.V. Lavrinovich
(signature)

Certification of translation:

I, Roman Plyamovaty, verify under oath that I have the knowledge of the Ukrainian language, that I am a U.S. citizen, and that the above translation from Ukrainian into English of the contents is true and correct, to the best of my knowledge.

/s/ R. Plyamovaty
Roman Plyamovaty 1/10/04

Exhibit No. 21

Translation

CABINET OF MINISTERS OF UKRAINE

Re.:
With regard to the instrument of the Ministry of Justice dated July 9, 2003 No. No-9-5697

To: Prosecutor General's Office
(PISKUN S.M.) [Prosecutor General – note of translator]

The Proposition of the Ministry of Justice is hereby approved.

To: Ministry of Justice
(LAVRINOVICH O.V.) [Minister of Justice – note of translator]

To: Ministry of Foreign Affairs
(ZLENKO A.M.) [Minister of Foreign Affairs – note of translator]

To: Supreme Court of Ukraine
(MALYARENKO V.T.) [Chairman of the Supreme Court of Ukraine – note of translator]

To: Silkin S.F.

Signature
Mikola AZAROV (Note of translator: First Deputy Prime Minister and portfolio of the Minister of Finance)

Stamp of the Cabinet of Ministers of Ukraine,
Secretariat; Department of File Processing and Monitoring

July 19, 2003
No. 38192

Outgoing 81506

Handwritten on the Ordinance by Prosecutor General Piskun:

"To I.V. DRIZHCHANY, O.A. KHRISTENKO, O.I. MEDVEDKO. For information.

(Signed S. PISKUN). 07.22.2003."
(Note of translator: I.V. DRIZHCHANY, O.A. KHRISTENKO, O.I. MEDVEDKO were the Deputy Prosecutors General of Ukraine).

Certification of translation:

I, Roman Plyamovaty, verify under oath that I have the knowledge of the Ukrainian language, that I am a U.S. citizen, and that the above translation from Ukrainian into English of the contents is true and correct, to the best of my knowledge.

/s/ R. Plyamovaty
Roman Plyamovaty

Date: January 10, 2004

Exhibit No. 22

Translation

Coat of Arms of Ukraine
Prosecutor's Office

Prosecutor General's Office of Ukraine

01011, Kyiv-11, Riznitska St., 13/15

September 15, 2003
No. 08/1 /1-11015-97

President of Ukraine
Kuchma L.D.

Your Excellency Leonid Danilovich!

In 1998, the Prosecutor General's Office opened the criminal case with regard to Kiritchenko P.M. and Lazarenko P.I. involving charges of crimes, including the misappropriation of the State and collective property in especially greater amounts. In the course of the investigation of the matter it was established that the above persons have considerable amounts of money and of property in other countries. You empowered the Prosecutor General's Office of Ukraine to undertake work with regard to repatriation into Ukraine of money, acquired illegally and withdrawn by Kiritchenko P.M. and Lazarenko P.I. outside of its borders.

With the objective of the organization and the support of conducting in the USA of the legal work and for issuing the judicial decision on the injunction of the transfer of assets of P.M. Kiritchenko and

Lazarenko P.I., including the realty assets in the name of the California companies controlled by them, Dugsbery Inc., Brancross U.S. Holdings, Inc., BRC Property Holdings LLC, Xanadu Property Holdings, LLC, and for further advancing the material claims of Ukraine for the assets in accordance with the laws of Ukraine, the Prosecutor General's Office of Ukraine engaged the firm Universal Trading & Investment Co. (UTICo) and empowered it to conduct the necessary legal procedures.

The firm UTICo, on the basis of the agreement, undertook the measures with regard to locating property and money of Kiritchenko P.M. and Lazarenko P.I. and appeared at the U.S. District Court, for the Northern District of California, which took the decision on freezing the assets of said citizens. Further, through the assistance of the firm UTICo, money of Lazarenko P.I. was located and blocked for the amount of more than $270 million in the banks of Guernsey, Antigua, and of other countries.

At the same time, in August 2002, Kiritchenko P.M. through his representative filed at the Pechersk District Court of the City of Kyiv a lawsuit against the Prosecutor General's Office, with the third person UTICo, for declaring invalid the documents with which the Prosecutor General's Office empowered the firm for conducting such work.

In the decision of Pechersk District Court of the City of Kyiv of March 4, 2003, which denied relief to Kiritchenko P.M. per his lawsuit because of the statute limitations, it was noted that the Prosecutor

General's Office did not have the legal grounds to issue the power of attorney to the firm UTICo for conducting the matter with regard to Kiritchenko P.M. and to give it the right of representing the material claims of the State of Ukraine. While taking that decision, the court did not involve into the consideration of the matter the appropriate body for participating in that matter. In accordance with the Constitution of Ukraine, S. 42 of the Articles of the Ministry of Justice of Ukraine, established by the Decree of the President of Ukraine of January 30, 1997, No. 1396/97, the Ministry of Justice is such a body. The Prosecutor General's Office informed the Ministry of Justice of Ukraine on the circumstances and on the results of the consideration of that case and has raised the issue of taking by said Ministry the measures with regard to initiating the reversal of the judicial decision, having practically exhausted the measures of response by the prosecutor's office. The Ministry of Justice of Ukraine has not undertaken any actions.

In July 2003, Lazarenko P.I. filed an analogous lawsuit against the Prosecutor General's Office. By the decision dated September 4, the Pechersk District Court in the City of Kyiv also validated the claim of that plaintiff.

In the circumstances of the above judicial decisions the Prosecutor General's Office of Ukraine is deprived of the possibility to continue the measures already begun, aimed at the protection of the rights and lawful interests of Ukraine with regard to the

assets of Kiritchenko P.M. and Lazarenko P.I., acquired by them for the money obtained in illegal manner, as well as the legality of the actions of the firm UTICo has been put under cloud, that may bring in the consequence of reversing the freezing of the accounts of Kiritchenko P.M. and Lazarenko P.I.

Taking into account such circumstances, with the objective to avoid the possible negative consequences for Ukraine, for not allowing Lazarenko P.I. and Kiritchenko P.M to avoid the material responsibility to the detriment of Ukraine, I request you to direct the Ministry of Justice of Ukraine to undertake the measures for the protection of the interests of Ukraine for the annulment of the decision by the Pechersk District Court in the City of Ukraine dated March 4, 2003, in the lawsuit of Kiritchenko P.M. against the Prosecutor General's Office of Ukraine, to appear in the case of the lawsuit of Lazarenko P.I. against the Prosecutor General's Office of Ukraine for the protection and reinstatement of the violated constitutional rights, and to confirm the empowering the Prosecutor General's Office of the task for conducting the activities for search and repatriation of the assets and money, acquired in illegal manner, that were withdrawn by Kiritchenko P.M. and Lazarenko P.I. outside of Ukraine.

With high esteem,

S. Piskun, signature, Prosecutor General of Ukraine

Certification of translation:

I, Roman Plyamovaty, verify under oath that I have the knowledge of the Ukrainian language, that I am a U.S. citizen, and that the above translation from Ukrainian into English of the contents is true and correct, to the best of my knowledge.

/s/ R. Plyamovaty
Roman Plyamovaty

Date: January 10, 2004

Exhibit No. 23

Translation

Administration of the President Coat of Arms of Ukraine

02.10.03 No. 31-01/1798

Minister of Justice of Ukraine O.V. Lavrinovich

Dear Oleksandr Volodimirovich !

In the name of the President, the statement of the Prosecutor General of Ukraine S. M. Piskun has been received with regard to the necessity, in his opinion, of giving by the President of Ukraine the commission to the Ministry of Justice to undertake measures for annulment of the decision of the Pechersk District Court of the City of Kyiv of March 4, 2003, in the matter of lawsuit of P.M. Kiritchenko against the Prosecutor General's Office of Ukraine, as well as appearing in the lawsuit by P.I. Lazarenko against the Prosecutor General's Office of Ukraine on the protection and reinstatement of the violated constitutional rights.

With regard to the public significance of these cases, we request you to consider said application and to inform on the results within a week's term the Prosecutor General's Office of Ukraine and the Administration of the President of Ukraine for briefing the Head of State.

Annex: 2 pages (incoming 134/34137-01)

With esteem,

First Deputy Head of the Administration
Of the President

Y. Zagorodnyi (signature)

Stamp of entry of the Ministry of Justice
Incoming No. 1-6-1047
10.05.2003

Certification of translation:

I, Roman Plyamovaty, verify under oath that I have the knowledge of the Ukrainian language, that I am a U.S. citizen, and that the above translation from Ukrainian into English of the contents is true and correct, to the best of my knowledge.

/s/ R. Plyamovaty
Roman Plyamovaty

Date: December 4, 2003

Translation

Coat of Arms of Ukraine

SUPREME COURT OF UKRAINE

DECISION
IN THE NAME OF UKRAINE

March 24, 2006 City of Kyiv

The Board of Judges, the Civil Chamber, of the Supreme Court of Ukraine,

Presiding Judge: A.V. Gnatenko
Judges: V.M. Barsukova
L.I. Grigorieva, –

having considered in the regular session the case brought by Lazarenko, Pavlo Ivanovich, against the Prosecutor General's Office of Ukraine, third party being Universal Trading & Investment Co. (UTICo) (hereinafter "Firm"), seeking protection and restoration of allegedly violated constitutional rights,

DETERMINED:

In July of 2003, claimant brought a matter in which he alleged the violation of his constitutions rights: a right to privacy, to property, and a right to information, by way of declaring invalid the Power of Attorney from April 30, 1999, made by respondent to the Firm that is situated in the USA, as well as by determining unlawful the declarations made to the

president of the Firm in the instrument No. 06-11015/97, of August 11, 1999.

Referring to the above, claimant requests to obligate the respondent to advise the Firm that the Power of Attorney was invalid, to retract the above mentioned instrument and any other powers, given to the Firm, claiming that those documents do not correspond to the requirements of the legislation in Ukraine.

By its decision, the Pechersk municipal court granted on September 3, 2003 partial relief. That was left without changes by a decision on July 7, 2005, of the Court of Appeals for the City of Kyiv.

By submitting the cassation appeal, the Prosecutor General's Office requests to hold void these judicial decisions, claiming the violation by these courts of the substantive law and of the procedural law.

In accordance with part 2 of Article 324 of the Civil Procedural Code of Ukraine, the grounds for the annulment is the wrong interpretation by a court of substantive law and the violation of the maxims of the procedural law.

Because the arguments in the cassation appeal provide the grounds for concluding that the lower courts violated the maxims of the substantive and of the procedural law, which led to the wrong resolution of this case, the Board of judges resolves to take the matter into the Supreme Court's adjudication.

Being guided by Articles 327, 332 of the Civil Procedural Code of Ukraine, the Board of judges of the Supreme Court

ADJUDGED:

The matter brought by Lazarenko, Pavlo Ivanovich, against the Prosecutor General's Office of Ukraine, third party Universal Trading & Investment Co. (UTICo) seeking a protection and restoration of allegedly violated constitutional rights **shall be taken for the Supreme Court's adjudication**.

The current decision may not be appealed from.

Presiding Judge:	**A. V. Gnatenko** (signed)
Judges:	**V.M. Barsukova** (signed)
	L.I. Grigorieva (signed)

Note of translator: emphasis in the translation is retained as it is in the original Ukrainian text.

VERIFICATION OF TRANSLATION

I, Roman A. Plyamovaty, verify, under penalty of perjury under according to the laws of the United States that I have knowledge of the Ukrainian language and that I am competent to undertake translations from that language, by virtue of my education in linguistics and philology, as well as by virtue of my background, that I am a U.S. citizen, and that the

above translation from Ukrainian into English, to the best of my knowledge, is true and correct.

Made in Boston, dated: SEPTEMBER 30, 2008

/s/ Roman A. Plyamovaty
ROMAN A. PLYAMOVATY

Translation

Coat of Arms of Ukraine

SUPREME COURT OF UKRAINE

DECISION
IN THE NAME OF UKRAINE

June 14, 2006 City of Kyiv

The Board of Judges, the Civil Chamber, of the Supreme Court of Ukraine,

Presiding Judge: V.M. Barsukova,
Judges: M.I. Balyuk,
O.F. Volkov,
L.I. Grigorieva,
V.I. Gumeniuk, –

having considered in the judicial session the claim of Lazarenko, Pavel Ivanovich, against the Prosecutor General's Office of Ukraine, the third party being Universal Trading & Investment Co. (UTICo) (hereinafter the "Firm"), seeking protection and restoration of allegedly violated constitutional rights,

DETERMINED:

In July of 2003, P.I. Lazarenko filed a claim against the Prosecutor General's Office of Ukraine, seeking protection and restoration of his allegedly violated constitutional rights. Said complainant submitted that the Prosecutor General's Office of Ukraine

represented by Ukraine's Prosecutor General M.O. Potebenko executed in April of 1999 the Power of Attorney to the Firm, situated in the United States of America, empowered it to organize and to secure collection of the evidence and to undertake the legal works towards obtaining judicial decisions on prohibiting any alienation of the real estate that may possibly be held by the complainant.

Apart from the above Power of Attorney, on August 11, 1999 the Prosecutor General's Office of Ukraine directed to the president of the Firm the Instrument by virtue of which it in fact assigned to the said Firm the rights to the claims with regard to the real properties that the complainant might hold, in such volume in which the Firm will be able to prove in the U.S. District Court the illegal ownership thereof, with the term of crediting that recovery towards the payment due by the Ukraine side to the Firm for its services.

Alleging that the above acts of the Prosecutor General's Office of Ukraine entailed an unlawful collection of the evidence and its use with regard to the complainant and that the claim for the realty which he might hold was unlawful and without foundation, P.I. Lazarenko sought to restore the legal status by way of declaring unlawful the Power of Attorney of April 30, 1999, made to the Firm, and the Instrument on the assignment of the claims, of August 11, 1999, and to annul any powers given by the Prosecutor General's Office to the Firm with regard to the complainant and to the respective realty assets.

Considering the filed matter, on July 18, 2003 the judge of Pechersk municipal court of Kyiv ruled that the Foreign Firm, UTICo, was a third party in that case.

By the decision of Pechersk municipal court of Kyiv on September 3, 2003, that claim was satisfied in part. It resolved to restore the constitutional rights of P.I. Lazarenko by way of declaring ineffective the Power of Attorney No. 12-11015-97, of April 30, 1999, made by the Prosecutor General's Office of Ukraine to the Firm UTICo, federal No. 04-3181148, USA, at 33 Almont Street, Winthrop-Boston, MA 02152, USA, in the part of giving to that Firm the powers for organizing and securing the legal works in the United States for purposes of obtaining the judicial decision on prohibiting any alienation of the assets, including the realty in the name of the companies in the USA, controlled by P.I. Lazarenko, and for furthering the material interests of Ukraine with regard to such assets, in accordance with the laws of Ukraine as well as proceedings in Ukraine; by way of deeming ineffective the instrument No. 06-11015/97 of August 11, 1999, directed by the Prosecutor General's Office to the president of the Firm Mr. Y.A. Lambert, in the part of the assignment of the material claims with regard to the real estate assets held by P.I. Lazarenko, in such volume in which that Firm may be able to prove in the U.S. District Court the illegal proprietorship thereof, with the term of crediting that recovery towards the payments due by the Ukraine side for the works accomplished by UTICo in

accordance with the instruments No. 12-01379-97 of May 15, 1998 and No. 12-11015-97 of October 2, 1998. The court obligated the respondent to retract the powers given to the Firm, UTICo, with regard to P.I. Lazarenko, pursuant to the above Power of Attorney and the Instrument.

By its decision of July 7, 2005, the Court of Appeals for the City of Kyiv left the municipal court's decision without changes.

In its cassation appeal, the Prosecutor General's Office of Ukraine requests to annul the decisions of the lower courts claiming that those courts violated the norms of the procedural law and of the substantive law and to deny the claim.

The cassation appeal must be granted in part on the following grounds:

In accordance with Article 213 of the Civil Procedural Code of Ukraine, decisions of a court must be legal and must have a foundation.

When allowing the claim, the lower court supposed that in the light of the Constitution of Ukraine, the Act of Ukraine 'On Prosecutor's Office', the Civil Code of Ukraine, the Prosecutor General's Office, acting in the name of the State, lacked the authority to make the Power of Attorney for engaging the foreign Firm for disposing of P.I. Lazarenko's assets and for furthering the material claims, which meant a violation of the complainant's constitutional rights.

However, one must not agree with such conclusions of the court.

From the materials of the case, it is established that on April 30, 1999 Ukraine's Prosecutor General, by means of the Power of Attorney No. 12-11015-97, empowered the Firm, on the basis of the collected evidence and of the determination of the assets' holding in the U.S. by Ukrainian citizens Kiritchenko, Petro Mikolayovich, and Lazarenko, Pavlo Ivanovich, to organize and to secure the legal works in the United States towards obtaining judicial decisions prohibiting any alienation of such assets and for furthering the material interests of Ukraine with regard to such assets, in accordance with the laws of Ukraine, as well as judicial decisions in Ukraine (a.s. 20).

Said Power of Attorney was made by Ukraine's Prosecutor General in connection with the fact that these citizens of Ukraine are charged with the crimes including the conversion of the State and public property in greater amounts, among other things, converted into the form of the realty assets, whose title has been held by the companies that these Ukrainian citizens control.

On August 11, 1999, the Prosecutor General's Office of Ukraine, by virtue of the Instrument No. 6-11015-97 directed to the president of the Firm, UTICo, taking into consideration the volume of the works that had already been implemented by the Firm, confirmed the Agreement that the Ukraine side

had assigned to the Firm the material claims with regard to the said real estate assets, in such volume in which the Firm will be able to prove in the U.S. District Court the illegal holding thereof, with crediting such recovery in the future towards the 12% of all the assets to be directed into Ukraine and those outside it (a.s. 19).

Supposing that the Prosecutor General's Office of Ukraine by virtue of such acts disregarded P.I. Lazarenko's constitutional rights, the court, in violation of Article 213 of the Civil Procedural Code, did not ascertain the nature of the legal relationship at issue, did not properly consider the submission of the Prosecutor General's Office. Namely, in between the Prosecutor General's Office and the Firm, there was a commission agreement, in accordance with which, pursuant to Article 387 of the Civil Procedural Code (ed. 1963), one side (which was empowered) undertakes to accomplish in the name and at the expense of the other side (which empowered) certain legal activities. By virtue of the Instrument of the Prosecutor General's Office of Ukraine, dated August 11, 1999, that compensation was granted to the Firm for the works that had already been accomplished.

In the light of the above established facts, the court disregarded the respective legal status of the Firm in that matter and the court failed to provide for bringing in that proceeding the Firm giving it the capacity of a respondent.

In addition, the Power of Attorney was granted by Ukraine's Prosecutor General on April 30, 1999 for one year. P.I. Lazarenko filed his claim in July of 2003. Because of the lapse of time, there existed a self-sufficient basis for denying such a claim. The court was required to properly review all the circumstances relating to the term of the Power of Attorney, for resolving that claim.

However, disregarding Articles 15, 15(1), 30 of the Procedural Code of Ukraine, the court failed to consider the time factor either.

In connection with the fact that the judicial decisions in this matter were in violation of the requirements of Article 213 of the Civil Procedural Code of Ukraine, those decisions are herewith held void, with the remand of the matter back to the lower court for a new consideration.

Being guided by Article 336 of the Civil Procedural Code of Ukraine, the Judicial Chamber of the judges of the Supreme Court of Ukraine,

ADJUDGED:

The cassation appeal of the Prosecutor General's Office is granted in part as follows.

The decisions of Pechersk municipal court in the City of Kyiv, of September 3, 2003, and of the Court of Appeals for the City of Kyiv, of July 7, 2005, are herewith annulled, and this matter is remanded to the lower court.

This Decision is not subject to appeal.

Presiding Judge: **V.M. Barsukova**
(signature)

Judges: **M.I. Balyuk**
(signature)
L.I. Grigorieva
(signature)
V.I. Gumeniuk
(signature)
O.F. Volkov
(signature)

210-301

Handwritten by State notary: "authenticated".

Note of translator: emphasis in the translation is retained as it is in the original Ukrainian text.

VERIFICATION OF TRANSLATION

I, Roman A. Plyamovaty, verify, under penalty of perjury under according to the laws of the United States that I have knowledge of the Ukrainian language and that I am competent to undertake translations from that language, by virtue of my education in linguistics and philology, as well as by virtue of my background, that I am a U.S. citizen, and that the above translation from Ukrainian into English, to the best of my knowledge, is true and correct.

Made in Boston, dated: SEPTEMBER 30, 2008

/s/ Roman A. Plyamovaty
ROMAN A. PLYAMOVATY

Exhibit X

The White House

Statements and Releases

Office of the Press Secretary

For Immediate Release February 11, 2010

Readout of the President's call with President-elect Yanukovych of Ukraine

President Obama called Victor Yanukovych of Ukraine today to congratulate him on his election and wish him success in carrying out his mandate. The President commended the Ukrainian people on the conduct of their February 7 vote. This peaceful expression of the political will of Ukrainian voters is another positive step in strengthening democracy in Ukraine. They agreed on the importance of continuing cooperation on nuclear non-proliferation. They also wished each other's athletes success in the Vancouver Olympic Games.

The strategic partnership between the United States and Ukraine is based on shared interests and values. These include expanding democracy and prosperity, protecting security and territorial integrity, strengthening the rule of law, promoting non-proliferation, and supporting reform in Ukraine's economic and energy sectors. The United States looks forward to working with President-elect Yanukovych and continuing to strengthen our cooperation with Ukraine's government and its Parliamentary leaders.

Exhibit X

The White House.

Statements and Releases

Office of the Press Secretary

For Immediate Release February 23, 2010

President Barack Obama Today Announced the designation of a Presidential Delegation to Kyiv, Ukraine to Attend the Inauguration of His Excellency Viktor Yanukovych, President-elect of Ukraine on February 25, 2010

The Honorable General James L. Jones, USMC (Ret), National Security Advisor to the President, will lead the delegation.

MEMBERS OF THE PRESIDENTIAL DELEGATION:

The Honorable John F. Tefft, U.S. Ambassador to Ukraine

The Honorable Melanne Verveer, Ambassador-at-Large for Global Women's Issues, U.S. Department of State

The Honorable Philip H. Gordon, Assistant Secretary, Bureau of European and Eurasian Affairs, U.S. Department of State

Ms. Kristina A. Kvien, Director for European Economic Affairs and European Union Relations, National Security Council

Exhibit X

Resolution on Ukrainian Democracy Passes Senate

Friday, March 5, 2010

The U.S. Senate passed a resolution recognizing the progress of Ukrainian democracy. Full text follows of the resolution introduced by U.S. Senate Foreign Relations Committee Ranking Member Dick Lugar and Chairman John Kerry:

111th CONGRESS

2d Session

S. RES. 422

Recognizing the important progress made by the people of Ukraine in the establishment of democratic institutions following the presidential run-off election on February 7, 2010.

IN THE SENATE OF THE UNITED STATES
February 25, 2010

Mr. LUGAR (for himself and Mr. KERRY) submitted the following resolution; which was referred to the Committee on Foreign Relations

---

RESOLUTION

Recognizing the important progress made by the people of Ukraine in the establishment of democratic institutions following the presidential run-off election on February 7, 2010.

Whereas adherence by Ukraine to democratic, transparent, and fair election standards has been necessary for full integration into the democratic community;

Whereas steps undertaken by Ukraine in recent years, including reform of election laws and regulations, the development of a pluralistic and independent press, and the establishment of public institutions that respect human rights and the rule of law, have enhanced Ukraine's progress toward democracy and prosperity;

Whereas the Organization for Security and Cooperation in Europe (OSCE) concluded that 'most OSCE and Council of Europe commitments were met' with regard to the conduct of the run-off presidential election on February 7, 2010;

Whereas international monitoring groups concluded that prior elections in Ukraine on January 17, 2010, and in 2007, 2006, and 2004, were also generally in accordance with international election norms;

Whereas the United States has closely supported the people of Ukraine in their efforts to pursue a free and democratic future since the declaration of their independence in 1991;

Whereas the NATO Freedom Consolidation Act of 2007 (Public Law 110-17; 22 U.S.C. 1928 note), signed into law by President George W. Bush on April 9, 2007, recognized the progress made by Ukraine toward meeting the responsibilities and obligations for membership in the North Atlantic Treaty Organization

(NATO) and designated Ukraine as eligible to receive assistance under the NATO Participation Act of 1994 (title II of Public Law 103-447; 22 U.S.C. 1928 note);

Whereas Ukraine has made steps toward integration within European institutions through a joint European Union-Ukraine Action Plan, as part of the European Neighbourhood Policy; and

Whereas the United States-Ukraine Strategic Partnership Commission was inaugurated by Secretary of State Hillary Clinton and Ukrainian Foreign Minister Petro Poroshenko on December 9, 2009: Now, therefore, be it

Resolved, That the Senate –

(1) recognizes the important progress made by the people of Ukraine in establishing democratic institutions and carrying out peaceful elections on January 17 and February 7, 2010;

(2) supports ongoing progress by Ukraine in addressing remaining challenges in the electoral processes as identified by the Organization for Security and Cooperation in Europe and other international election monitoring entities;

(3) encourages all parties to respect the independence and territorial sovereignty of Ukraine, as well as the full integration of Ukraine into the international democratic community;

(4) pledges further support for the development of a fully free and open democratic system, as well as a transparent free market economy, in Ukraine; and

(5) reaffirms its commitment to engage the Government of Ukraine in further development of bilateral cooperation through the United States-Ukraine Strategic Partnership Commission.

* * *

The Ukrainian Verkhovna Rada appointed a new government in full strength

March 11, 2010

KIEV, March 11 (Itar-Tass) – The Ukrainian Verkhovna Rada (parliament) appointed a new government in full strength on Thursday. 240 members of parliament voted for it, while the needed minimum was 226. Nikolai Azarov was appointed prime minister.

The prime minister and the newly appointed members of government were sworn in the Supreme Rada. They swore allegiance to the Ukrainian nation and promised to observe the Ukrainian Constitution and laws. After that Azarov and new government members put their signatures under the text of the oath.

Andrei Klyuev from the Party of Regions was appointed first deputy prime minister in the new government. Vladimir Seminozhenko was appointed deputy prime minister in charge of humanitarian problems. Boris Kolesnikov was appointed deputy prime minister in charge of preparations for the 2012 European football championship. Vladimir Sivkovich was appointed deputy prime minister in charge of the police and army problems, and Viktor Slauta became deputy premier in charge of the agro-industrial complex. Viktor Tikhonov, another deputy prime minister, will handle problems connected with the regional policy. Sergei Tigipko, the leader of the Strong Ukraine Party, was also appointed deputy prime

minister. Most probably, he will handle the reforming of the Ukrainian economy.

Viktor Boiko was appointed minister for environmental protection, Yuri Boiko – minister of fuel and energy, Konstantin Yefimenko – minister of transport, Dmitry Kolesnikov – minister of industrial policy, Mikhail Kulinyaka – minister of culture, and Alexander Lavrinovich – minister of justice.

Zinovy Mytnik was appointed minister of public health, Anatoly Mogilev – interior minister, Vasili Nadraga – minister of labour and social policy, Alexander Popov – minister of the housing and communal economy, Nikolai Prisyazhnyuk – minister of the agrarian policy, Ravil Safiulin – minister for family, youth and sports affairs, Dmitry Tabachnik – minister of education and science, Vasili Tsushko – minister of economy, Fyodor Yaroshenko – minister of finance, and Vladimir Yatsuba – minister of regional development. Konstantin Grishchenko was appointed foreign minister, and Mikhail Yezhel – defence minister. Anatoly Tolstoukhov was appointed minister in the cabinet of ministers.

The Supreme Rada voted as well for the resignation of the members of parliament, who were appointed to become members of the new government.

Minister of the cabinet of ministers Anatoly Tolstoukhov told journalists that the newly appointed government would start working right away. "I do not know whether or not the government will have a meeting on Thursday, but one thing is certain: the

government will start working right away. We shall meet today," he said. Tolstoukhov assured that the new government would work "in a responsible and effective way."

No. 09-1150

Supreme Court, U.S.
FILED
MAY 24 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNIVERSAL TRADING & INVESTMENT CO., INC.,

Petitioner,

v.

PETRO MIKOLAYEVICH KIRITCHENKO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PETER KIRITCHENKO, IZABELLA KIRITCHENKO, LUDMILLA KIRITCHENKO, BRANCROSS U.S. HOLDINGS, INC., BRC PROPERTY HOLDINGS, LLC, XANADU PROPERTY HOLDINGS, LLC, ABS TRADING, INC. AND MICHAEL MENKO

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STATEMENT OF QUESTIONS PRESENTED

Respondents submit that the following questions more accurately reflect the issues presented in the Petition for Writ of Certiorari:

1. Whether the district court and the Ninth Circuit Court of Appeals correctly determined that the Petitioner had no standing as a real party in interest because a purported Ukrainian assignment of claims to Petitioner was invalid under Ukrainian law.

2. Whether the district court and the Ninth Circuit Court of Appeals correctly considered the applicability of the act of state doctrine.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents BRC Property Holdings, LLC, Brancross U.S. Holdings, Inc., Xanadu Property Holdings, LLC, and ABS Trading, Inc. submit the following Corporate Disclosure Statements:

1. BRC Property Holdings, LLC ("BRC") is owned by Brancross U.S. Holdings, Inc. BRC is a limited liability company and therefore has no stock.

2. Brancross U.S. Holdings, Inc. does not have any parent corporation or any publicly held corporation that owns 10% or more of its stock.

3. Xanadu Property Holdings, LLC ("Xanadu") is owned by Brancross U.S. Holdings, Inc. Xanadu is a limited liability company and therefore has no stock.

4. To the best of respondents' knowledge, ABS Trading, Inc. does not have any parent corporation or any publicly held corporation that owns 10% or more of its stock.

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STATUTORY PROVISIONS INVOLVED

Respondents submit that the constitutional provisions and federal statutes referenced in the Petition are not implicated by the decisions of the district court and the Ninth Circuit Court of Appeals. Instead, the following Federal Rules of Civil Procedure are relevant to the Petition:

1. Federal Rule of Civil Procedure 17(a)

(a) Real Party in Interest.

(1) ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) ***Action in the Name of the United States for Another's Use or Benefit.*** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

2. **Federal Rule of Civil Procedure 44.1. Determining Foreign Law**

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

STATEMENT OF THE CASE

Petitioner Universal Trading & Investment Co. ("UTI") is a Massachusetts corporation that brought this lawsuit in 1999 to recover real estate in the United States that was purchased with funds that were allegedly misappropriated from the State of Ukraine by its former prime minister, Pavlo Lazarenko. UTI initially sued contending that the claims in its complaint belonged to Ukraine, and that UTI was prosecuting them under a power of attorney. (AERv4, 632-651 at ¶¶ 1, 26, 36, 43, 46, 47.)[1] Respondents moved to dismiss on grounds that UTI was not a real party in interest under Fed.R.Civ.P. 17(a).

UTI then produced a purported written assignment of claims, dated after the lawsuit was filed and signed by a Ukrainian deputy prosecutor. (AERv7, 1770-1772.) This purported assignment did not confer real party standing on UTI because, *inter alia*, the Ukrainian deputy prosecutor did not have authority under Ukrainian law to assign the ownership of Ukraine's claims to a third party. To confirm this, respondent Peter Kiritchenko initiated legal proceedings in Ukraine challenging the validity of the assignment. The trial and intermediate appellate courts in Ukraine ruled that the assignment was invalid, and the Supreme Court of Ukraine denied review. (AERv3, 248-254, 267-273, 323-330, 337-342.)

---

1. "AER __" refers to Appellees' Excerpts of Record before the Ninth Circuit Court of Appeals. "ER __" refers to Appellant's Excerpts of Record in those same proceedings.

The Kiritchenko respondents[2] then filed a motion for summary judgment in the district court, arguing that (1) the assignment was invalid under the Constitution and statutes of Ukraine; and (2) under Fed. R. Civ. P. 17(a) the assignment was an untimely sham created post-filing in an attempt to overcome respondents' challenge to UTI's standing. (AERv2, 66-96.) Respondents presented the district court with the relevant Ukrainian statutes and constitutional provisions, and with expert declarations explaining Ukrainian law. (AERv3, 158-443; AERv4, 444-475; AERv7, 1773-1777, 1778-1784, 1813-1832; AERv8, 2066-2096.) Respondents also asked the district court to consider the Ukrainian courts' interpretation of their own law in the legal proceedings that respondent Peter Kiritchenko had pursued. (AERv3, 248-423.) In addition, respondents submitted a sworn declaration of the Ukrainian deputy prosecutor who executed the assignment, attesting that the document was prepared after the litigation was filed to avoid the dismissal of claims and "solely in order to give the court jurisdiction to hear *Ukraine's* claims." (AERv2, 101-106.)

The district court granted respondents' motion for summary judgment in an unpublished order, finding that UTI lacked standing because it was not a real party in interest under Fed.R.Civ.P. 17(a). (Petition App. 6-60.) In a thoughtful and well-supported decision, the district

2. Throughout this brief, "Kiritchenko respondents" refers to respondents Peter Kiritchenko, Izabella Kiritchenko, Ludmilla Kiritchenko, Brancross U.S. Holdings, Inc., BRC Property Holdings, LLC, Xanadu Property Holdings, LLC, ABS Trading, Inc. and Michael Menko.

court examined Ukrainian law under Fed.R.Civ.P. 44.1 and held:

> Having read and considered the applicable statutes, constitutional provisions, and expert opinions, the court finds, even without consideration of the Ukrainian court decisions, that the PGOU [Prosecutor General's Office of Ukraine] lacked the authority to assign claims of Ukraine to UTI.

(Petition App. 55.) The district court also reviewed the Ukrainian court decisions and held that they were "in accord with th[e] Court's finding and provide[d] further support therefore." (*Id.*) The district court held that the act of state doctrine did not bar the court from ruling upon the legal validity of the assignment because (1) the government of Ukraine, by its courts, had itself invalidated the assignment; and (2) the doctrine did not apply because the act of state in question was not committed entirely within Ukraine. (Petition App. 23-27.)[3]

---

3. UTI erroneously states that on June 2, 2000, the first district court judge assigned to this case "denied defendants' motion to dismiss the second amended complaint, ruling that the August 11, 1999 assignment was valid," and that the subsequent district court judge "reconsidered [that] ruling without mentioning it." (Petition at 12.) To the contrary, during the June 2, 2000 hearing, the first district court judge expressly stated that he was not ruling on the validity of the assignment, noting that at that time, there were no decisions from a Ukrainian court addressing the matter, and acknowledging that the validity of the assignment was an issue that would "undoubtedly" need to be revisited at a later date, most likely under Fed.R.Civ.P. 44.1. (AER v3, 440-443.) That is precisely what the second district court judge did.

UTI argues that the Supreme Court of Ukraine, in a 2006 ruling rendered after the district court's summary judgment order, affirmed the validity of UTI's assignment. That argument was rejected by the district court in the context of a post-judgment proceeding under Fed.R.Civ.P. 60(b). (Petition App. 78-85.) The district court correctly held that the new Ukrainian Supreme Court order was irrelevant because (a) it was based upon procedural deficiencies and did not purport to find the assignment legally valid, and (b) in granting summary judgment the district court had conducted an independent evaluation of Ukrainian law that did not depend upon the decisions of the Ukrainian courts. (Petition App. 82-84.) UTI appealed both the original summary judgment order and the subsequent order refusing to change the outcome due to the 2006 ruling of the Supreme Court of Ukraine. (ERv1, 3-4; ERv1, 6-7.)

In an unpublished Memorandum decision, the Ninth Circuit Court of Appeals affirmed. It held that (a) the district court had not erred in concluding that the assignment was invalid under Ukrainian law; (b) the purported assignment was a sham created only to overcome respondents' challenge to standing and could not confer standing under Fed.R.Civ.P. 17; and (c) UTI had failed to demonstrate that the assignment constituted the act of a foreign sovereign power, so the act of state doctrine was inapplicable. (Petition App. 1-3.)[4]

4. UTI erroneously states that the court of appeals "declined to consider any supplemental grounds for standing, (Cont'd)

UTI requested panel rehearing or rehearing en banc. The panel rejected rehearing. The suggestion for rehearing en banc was circulated to the full court, and no judge requested a vote on whether to rehear the matter en banc. (Petition App. 86-87.)

UTI's Petition raises political developments in Ukraine since the conclusion of the Ninth Circuit appeal in an attempt to argue that the current Ukrainian government would support UTI's position. Those facts are not in the record and should not be considered, but they are irrelevant in any case. Although it could easily have done so, the Ukrainian government never provided evidence or argument in this litigation to support the validity of the challenged assignment. It never urged the district court or the court of appeals to rule in UTI's favor. To the contrary, the Ukrainian deputy prosecutor general who executed UTI's purported assignment provided respondents' counsel with a declaration supporting respondents' position (AERv2, 101-105), and the Prosecutor General's Office of Ukraine confirmed in proceedings before the Supreme Court of Ukraine that it did not actually assign any claims to UTI, but merely authorized UTI to act as an "agent . . . to fulfill certain legal actions on behalf of and at the expense of . . ." the Prosecutor's office. (AERv3, 427.) Such agency could not give UTI standing as a real party in interest.

(Cont'd)

such as UTICo's rights under the implemented agreements with Ukraine, enforcing its equitable lien, constructive trust, and equitable subrogation." (Petition at 21.) To the contrary, the court of appeals stated: "We have considered the other issues raised by UTI in its opening brief and reject them as meritless." (Petition App. 2.)

REASONS FOR DENYING THE PETITION

The decision of the Ninth Circuit Court of Appeals was correct and does not conflict with any decision of this Court or another court of appeals. Both the district court and the court of appeals correctly interpreted the law of Ukraine, which was controlling. Their interpretations of Ukrainian law were consistent with what the Ukrainian courts decided, as well as with the Constitution and statutes of Ukraine and the experts' opinion. There is no good reason for this Court to further interpret the law of Ukraine. To the extent that United States federal law was implicated, the district court and court of appeals correctly applied settled principles of law, and this case does not raise any important issue of federal law. For these reasons, the Petition for Writ of *Certiorari* should be denied.

I. The Courts Below Properly Concluded That Petitioner Lacked Standing As a Real Party in Interest

Petitioner argues that the district court and court of appeals erred by not determining that the assignment was valid based upon a 2006 ruling of the Supreme Court of Ukraine, which petitioner contends held that the assignment of claims was valid under Ukrainian law. Petitioner is wrong for several reasons.

(a) As the district court properly concluded, the 2006 ruling was made on procedural issues, and did not hold that the assignment was valid. (Petition App. 83-84; ERv2, 14. *See also* Petition App. 2.)

(b) The Ukrainian courts actually determined that the assignment was invalid. There were two relevant decisions by the Supreme Court of Ukraine. The 2006 ruling relied upon by UTI was rendered in Ukrainian litigation instituted by respondent Pavlo Lazarenko, and did not decide the issue of the assignment's legal validity. (*Id.*) In litigation instituted by respondent Peter Kiritchenko, the Ukrainian Supreme Court had already denied review on the merits of an appellate decision holding the assignment of claims to be invalid. (Petition App. 9-15, 29; AERv3, 337-342.)[5]

(c) The district court performed an independent analysis of the Ukrainian Constitution and statutes and correctly concluded that Ukrainian prosecutors have power to represent the state, but not to assign away its claims. (Petition App. 46-57.) This interpretation was supported by declarations of Ukrainian law experts submitted in support of the respondents' motion for summary judgment and properly considered under Fed.R.Civ.P. 44.1. (Petition App. 49-50.)

(d) The Ninth Circuit Court of Appeals concluded, based upon the facts in the record, that the assignment document was a post-filing sham under Fed.R.Civ.P. 17. (Petition App. 2.) That finding provided an independent basis under United States law for the dismissal of UTI's

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5. UTI erroneously states that the district court should not have relied on the Ukrainian court rulings in Mr. Kiritchenko's case because UTI was not served with process in those proceedings and because the ruling that the assignment was invalid was "dicta." (Petition at 27-28.) However, both the district court and the court of appeals considered and properly rejected these arguments. (*See* Petition App. 2, 12, 29, 45-46.)

suit, regardless of Ukrainian law on the authority of deputy prosecutors to assign claims.

Petitioner's arguments based upon Ukrainian court proceedings are wrong but, perhaps more importantly for present purposes, there is no good reason for this Court to clarify or interpret the law of Ukraine. Such an exercise would require this Court to analyze numerous decisions of the Ukrainian courts, as well as the Constitution and statutes of that country and experts' opinions on Ukrainian law, and then pronounce what Ukrainian law is on an issue already decided by the legislature and courts of Ukraine. No issues of United States federal law would even be involved.

II. The Courts Below Properly Considered the Applicability of the Act of State Doctrine

Petitioner argues that the district court and court of appeals erred by not concluding that the act of state doctrine mandated that United States courts accept the purported assignment of claims by a Ukrainian deputy prosecutor. Petitioner is wrong for several reasons.

(a) The decisions of the Ukrainian courts, as well as that country's statutes and Constitution and expert opinions, establish that the assignment was invalid under Ukrainian law. (Petition App. 46-57.) Contrary to petitioner's assertion, the district court properly found that the 2006 ruling of the Supreme Court of Ukraine did not hold that the petitioner's assignment of claims was valid. (Petition App. 83-84; ERv2, 14; *see also* Petition App. 2) For this Court to require acceptance of the assignment would turn the comity-based act of state

doctrine on its head because it would result in the courts of the United States validating an assignment that the courts of Ukraine held to be invalid.

(b) The Ninth Circuit's ruling that the purported assignment was a sham under Fed.R.Civ.P. 17 is an independent basis under United States law for the dismissal of petitioner's claims. (Petition App. 2.) The act of state doctrine is not implicated with respect to dismissal on this basis. Even if a Ukrainian deputy prosecutor had legal authority to assign away claims (which he did not), under American law he could not sign an assignment after the case was instituted solely to provide a basis for the court to hear Ukraine's (not Petitioner's) claims. That is what the deputy prosecutor attested that he did, and it is impermissible under Fed.R.Civ.P. 17.

(c) The act of state doctrine was formulated by the courts to avoid potential embarrassment to the Executive Branch in the conduct of foreign relations. *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). Here, the Executive Branch, through the Department of Justice, was a party to the litigation, having intervened long before respondents filed their summary judgment motion. (ER6, 63.) The Executive Branch never opposed respondents' attempts to have the case dismissed in the district court or the court of appeals based on the invalidity of the purported assignment.

(d) Contrary to petitioner's suggestion, the district court did not create a new, arbitrary rule under the act of state doctrine, and its interpretation of the doctrine did not deviate from this Court's precedent. The district

court properly held that the act of state doctrine cannot apply where, as here, the foreign government (the courts of Ukraine) concedes the unlawfulness of the act in question (the invalid assignment). (Petition App. 24-25.) The district court also relied upon settled federal precedent that the act of state doctrine applies to the acts of a foreign sovereign committed within its own territory, while in this case the act of the Ukrainian deputy prosecutor was extraterritorial. (Petition App. 25-27.) The purported assignment was a document that said Ukraine "will assign" to UTI claims to real estate located in the United States and owned by United States citizens and legal residents "to the extent that you [UTI] can prove in your [U.S.] Federal Court the unlawful ownership of such real estate . . ." (AERv7, 1770-1772.) The district court properly relied upon established precedent on this issue. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Liu v. Republic of China*, 892 F.2d 1419, 1433 (9th Cir. 1989); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972); *Tabacalera Severiano Jorge v. Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir. 1968); *Republic of Iraq v. First National Bank*, 353 F.2d 47, 51 (2nd Cir. 1965). (*Id.*) This litigation provides no reason for this Court to revisit existing law on the act of state doctrine.

(e) The court of appeals properly held, based upon the factual record, that UTI had ". . . failed to demonstrate that the assignment constitutes the act of a foreign sovereign power; the act of state doctrine is therefore inapplicable. *See Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989) ('The burden of proving acts of state rests on the party asserting the

applicability of the doctrine')." (Petition App. 2.) Again, both the deputy prosecutor who executed the assignment document and the Prosecutor General's Office in Ukrainian pleadings disavowed the notion that the government of Ukraine had actually assigned the ownership of claims to UTI. (AERv2, 101-105; AERv3, 427.) Moreover, the Ukrainian courts held that the assignment was not a valid act of Ukraine. There is no good reason for this Court to reevaluate these factual findings.

III. This Court Should Not Decide the Scope of Implied Powers Under the Ukrainian Constitution

Petitioner's third and final argument is that this Court should decide the scope of implied powers under the Ukrainian Constitution in order to conclude that the deputy prosecutor did have authority to assign away claims. As it was appropriate to do under Fed.R.Civ.P. 44.1, the district court carefully examined the Ukrainian Constitution, relevant Ukrainian statutes, the opinions of Ukrainian law experts, and the decisions of a multitude of Ukrainian judges in numerous court decisions. (Petition App. 46-57.)[6] The court of appeals

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6. UTI erroneously states that "[t]he District Court's refusal to give extraterritorial effect to the August 11, 1999 assignment is inconsistent with United States policies that (1) permit foreign nations to sue in this country" and that "[t]he District Court's interpretation of Ukraine's Constitution . . . leaves no organ of the state with the authority to prosecute illegal transportation of public property outside the country . . . " and "frustrates Ukraine's ability to act in its interest abroad." (Petition at 36, 40, 41.) To the contrary, the District Court recognized that the PGOU itself was authorized to prosecute actions in court on behalf of the State of Ukraine, and

(Cont'd)

considered and affirmed this careful analysis. (Petition App. 2.) There is no good reason for this Court to engage in developing Ukrainian constitutional law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

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(Cont'd)

the State of Ukraine could have instituted action in its own name in the district court. (Petition App. 47.) What the district court and court of appeals held was that a deputy prosecutor of the PGOU did not have legal authority to assign to third parties (such as UTI) claims belonging to the State of Ukraine, and that in any event, the purported assignment here was a post-filing sham under United States law. (Petition App. 2, 57.)

No. 09-1150

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNIVERSAL TRADING & INVESTMENT CO., INC.,

Petitioner,

vs.

PETRO MIKOLAYEVICH KIRITCHENKO,
PAVLO IVANOVICH LAZARENKO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY

I. The 2006 Ukraine Supreme Court Ruling Validating The Assignment Presents An Important Federal Question About Enforcement Of Foreign Judgments In Favor Of United States Citizens

Respondents attack the premise of the argument of petitioner Universal Trading and Investment Company ("UTICo") that Ukraine Supreme Court held the assignment of Ukraine's claims to it (Pet. 143-44) was valid. (Opp'n 8-10.) Contrary to respondents' contention, Ukraine Supreme Court did not rule solely on procedural grounds. (Opp'n 6, 8.)

In its March 24, 2006 preliminary ruling, Ukraine Supreme Court stated it granted review because "the arguments in the cassation appeal provide the grounds for concluding that the lower courts violated the maxims *of the substantive* and of the procedural law, which led to the wrong resolution of this case. . . ." (App. 161 [emphasis added].) Ukraine Supreme Court's June 24, 2006 decision reached the substantive validity of the power of Ukraine Prosecutor General's Office ("UPGO") to contract with and to assign Ukraine's claims against Lazarenko to UTICo. (App. 164-71.) It overturned the conclusion of the lower court that UPGO lacked authority to engage UTICo for disposing of Lazarenko's assets and furthering the material claims. (App. 167-68.) In no uncertain terms, the decision "confirmed the Agreement that the Ukraine side had assigned to the Firm the material claims with regard to the said real

estate assets. . . ." (App. 168-69.) It also found an assignor-assignee relationship existed under Article 387 of the Civil Procedural Code that Ukraine lower courts did not "properly" consider. (App. 169; AER 427.)

Respondents exalt dicta in Kiritchenko's Ukraine municipal case into binding precedent. (Opp'n 9.) Kiritchenko did not serve or give notice to UTICo in a manner that would permit it to participate in his Ukraine case. (App. 13-14 [9/7/07 Ord. 20-21].) Additionally, Ukraine courts denied Kiritchenko's claims as time-barred. (Pet. 13; App. 11-12.)

Respondent also is incorrect that Ukraine Supreme Court denied review in Kiritchenko's case "on the merits of an appellate decision. . . ." (Opp'n 9 [citing App. 9-15, 29; 3 AER 337-42].) To the contrary, Kiritchenko withdrew the appeal he filed with the Ukraine Supreme Court. (App. 12.) On June 10, 2004 and February 3, 2005, Ukraine Supreme Court denied UPGO's two subsequent appeals, citing procedural flaws without addressing the merits. (App. 14-15.)

It was not until the 2006 Ukraine Supreme Court decision in Lazarenko's case that Ukraine Supreme Court expressed a view on the authority of UPGO to assign Ukraine claims abroad to third parties in the interest of the State. (Pet. 16; App. 167-70.) While the District Court performed an independent analysis of Ukraine's constitution and other law to conclude that

UPGO did not have power under Ukraine law to assign Ukraine's claims to UTICo (Opp'n 9 [citing App. 46-57]), its analysis wrongly assumed Ukraine Supreme Court had not yet decided Lazarenko's appeal. (App. 19.)

Respondents argue the finding by the Ninth Circuit that the August 11, 1999 written assignment "was a sham created only to overcome defendants' initial challenge to standing" (App. 2) "provided an independent basis under United States law for the dismissal of UTI[Co]'s suit." (Opp'n 9-10.) But that cannot be reconciled with the 2006 Ukraine Supreme Court decision that the Ninth Circuit judicially noticed but failed to acknowledge legitimated the assignment. (App. 3, n.1.)

Moreover, the Ninth Circuit misapplied adversity jurisdiction concept to a case arising under its subject matter jurisdiction. Sham assignments are usually, if not exclusively, a creature of diversity jurisdiction cases, where one party attempts to create federal jurisdiction by transferring a claim to a party residing or domiciled in another state. *See, e.g.*, *Attorneys Trust v. Videotape Computer Prod., Inc.*, 93 F.3d 593, 595-96 (9th Cir. 1996). Even if *Attorneys Trust*[1] applied to subject matter jurisdiction cases, there are several factors that the Ninth Circuit should have considered; including (1) whether there

[1] UTICo has not found one decision applying the concept of sham assignments to a case with subject matter jurisdiction.

were good business reasons for the assignment, (2) did the assignee have a prior interest in the item or was the assignment timed to coincide with commencement of litigation, (3) was any consideration given by the assignee, (4) was the assignment partial or complete, and (5) was there an admission that the motive was to create jurisdiction. *Id.* "The objective fact of who really is the party in interest is the most important thing to be determined." *Id.* at 596.

Factors listed in *Attorneys Trust* support the conclusion that the assignment was valid. First, Obykhod's Amicus Letter, executed April 13, 1999, before the original complaint's filing on June 24, 1999 (App. 118-42), shows that Ukraine had good business reasons for the assignment. (*See* App. 142 ["In connection with the above and having all grounds to do so, the Prosecutor General Office of the Ukraine supports suit of UTICo to attach all realty of Petro M. Kiritchenko on the territory of the USA, which was acquired from proceeds from crime and registered on the companies controlled by him."].)

Secondly, UTICo as assignee additionally had a future, actionable interest in the realty created by the 1998 agreements prior to the 1999 assignment. *Restatement (Second) of Torts* § 243; *Weizmann Institute of Science v. Neschis*, 229 F.Supp.2d 234, 253 (S.D.N.Y. 2002). This interest was the equivalent of that of a *bona fide* purchaser of the claims in the United States and as the assignee for valuable consideration of the claims.

There was also actual consideration provided by UTICo to Ukraine, as explained and affirmed in the June 14, 2006 Ukraine Supreme Court decision in Lazarenko's case. (*See* App. 169 ["By virtue of the Instrument of the Prosecutor General's Office of Ukraine, dated August 11, 1999, *that compensation was granted to the Firm* for the works *that had already been accomplished*." [emphases added].)

Regarding the fourth factor, whether the assignment was partial or complete, the August 11, 1999 letter (App. 143-44) was sufficient to transfer to UTICo all of Ukraine's claims, including those for injuries from predicate acts under RICO, to the U.S.-located realty owned by defendants. *See, e.g.*, *Lerman v. Joyce International, Inc.*, 10 F.3d 106, 112-13 (3d Cir. 1993) (holding that claims for RICO injuries were transferrable under a general assignment of "all . . . causes of action" and "claims . . . of whatsoever nature" that eliminated the possibility of split recoveries or duplicative liability by extinguishing the assignor's right to assert Racketeer Influenced and Corrupt Organizations Act ("RICO") claims; *see also United States ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (holding that "[a]s a general rule, terms of art are not required for a valid Assignment"). Because the U.S. realty assets that Ukraine assigned, identified property by property in the April 13, 1999 Amicus Letter from Obykhod (App. 139), counted towards but did not satisfy the 12% of commission UTICo already earned (App. 144, 168-69), the

assignment completely relinquished all of Ukraine's interest in the assets.

As for the fifth factor, an admission that the motive was to create jurisdiction, respondents' focus on the subjective averment of Ukraine Deputy Prosecutor Obykhod that the assignment was given "solely in order to give the court jurisdiction to hear Ukraine's claims" (O'ppn 4 [citing AER 101-06]) is misplaced.[2] First, Obykhod's successor, Viktor Kudriavtsev, again in office, challenged Obykhod's subjective views in 2003. (3 ER 199.) The Prosecutor General reconfirmed Kudriavtsev's views in a letter to the President. (App. 153.)

Second, because the amended complaint dated October 4, 1999 had asserted a cause of action under RICO (AER 777-84), there was subject matter jurisdiction by the time respondents' first motion to dismiss was heard on January 24, 2000, and thus no need for UPGO to assign Ukraine's rights to engineer diversity jurisdiction. Indeed, Judge Charles Legge made clear the distinction between standing and jurisdiction in disposing of respondents' motion to dismiss UTICo's second amended complaint on June 2, 2000. (7 ER 58 [citing *Airlines Reporting Corp. v. S and N Travel, Inc.*, 58 F.3d 857, 862, n.4 (2d Cir. 1995)].) Judge Legge's finding that UTICo was a real

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[2] "There is some doubt that the subjective 'motive' element is entitled to great weight." *Attorneys Trust*, *supra*, 93 F.3d at 596 (citation omitted).

party in interest, independent of whether there was diversity jurisdiction (7 ER 58), shows the most important factor under *Attorneys Trust*, "[t]he objecttive fact of who really is the party in interest. . . ." 93 F.3d at 596.

The amended complaints, filed after the August 11, 1999 assignment, asserted UTICo's own claims, not Ukraine's claims by proxy, in accordance with the assignment of Ukraine's claims to UTICo. (1 ER 89-166; AER 748-99.) The District Court properly found the claims UTICo asserted on behalf of Ukraine in the original complaint predating the assignment irrelevant to the standing issue. (App. 22-23.)

Granting certiorari on the first question presented will not require "this Court to clarify or interpret the law of Ukraine." (Opp'n 10.) To the contrary, UTICo's first question presents an important question under United States law about the scope of offensive collateral estoppel applied to foreign judgments in favor of United States citizens. Resolution of this question does not require analysis of Ukraine law any more than *Hilton v. Guyot*, 159 U.S. 113, 170-71, 210 (1895), required analysis of the law of France.

II. In Refusing To Apply The Act Of State Doctrine, The Lower Federal Courts Relied Erroneously On Dicta In Lower Ukraine Cases Overruled By The 2006 Ukraine Supreme Court Decision And, In Derogation Of American Interests, Misapplied A Line Of Cases Involving Foreign Government Acts Confiscating Property And Committing Criminal Conduct Outside Its Territory

In opposing UTICo's second question presented, respondents argue the District Court properly held that the act of state doctrine could not apply. (Opp'n 11-13.) On the contrary, recognizing the acts of Ukraine's Executive in 2002-2003 (App. 105-08, 145-59) and the 2006 Ukraine Supreme Court decision (App. 164-72), all approving of UPGO's agreements with UTICo in 1998 (App. 93-95; 3 ER 66-67, 91-92) and assignment of claims to UTICo in 1999 (App. 101-02, 143-44), furthers the comity-based concerns underlying the act of state doctrine.

The power-of-attorney allegations of the original complaint should not distract this Court from the important questions raised by the lower courts' refusal to recognize the acts of Ukraine's Executive in 2002-2003 and the 2006 Ukraine Supreme Court decision, all approving of UPGO's agreements with UTICo in 1998 and assignment of claims to UTICo in 1999. The clearly erroneous ruling of the Ninth Circuit that the assignment was a sham under Federal Rule of Civil Procedure 17 cannot withstand scrutiny as an independent basis for dismissal of petitioner's

claims. Moreover, because the highest levels of Ukraine's Executive approved and ratified the assignment, the ruling contravenes the fundamental tenet of the act of state doctrine that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another. . . ." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

"[B]oth the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government." *First Nat. City Bk. v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972). "It is also buttressed by judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties." *Id.* "[I]t has also been suggested that a doctrine of deference based upon the absence of consensus as to controlling principles of international law allocates legal competence among nations in a manner that promotes the growth of international law. *See generally* R. FALK, *The Status of Law in International Society* 403-442 (1970); R. FALK, *The Role of Domestic Courts in the International Legal Order* 64-138 (1964)." *Alfred Dunhill of London, Inc. v. The Republic of Cuba, et al.*, 425 U.S. 682, 727, n.12 (1974) (Appendix 1 to Opinion).

Respondents suggest that the Executive Branch intervened in this case in support of respondents' case

going forward, notwithstanding the act of state doctrine. (Opp'n 11.) But the reason the Justice Department intervened was actually to request a stay of proceedings because of the criminal prosecution of Lazarenko and Kiritchenko. (6 ER 63, 73.) On December 7, 2005, after the criminal case was over, the District Court granted UTICo's motion to lift the stay. (6 ER 121.) The civil action resumed its course toward trial without further intervention of the United States Government.

Respondents raise the fact that the Executive Branch did not oppose respondents' attempts to dismiss the case. (Opp'n 11.) But "mere silence or neutrality on the part of the Executive" is actually a reason this Court has recognized to refrain from judicial review under the act of state doctrine. *First Nat. City Bk.*, *supra*, 406 U.S. at 767 ("[A]ny exception to the act of state doctrine based on a mere silence or neutrality on the part of the Executive might well lead to a conflict between the Executive and Judicial Branches.").

Respondents assert that "the district court did not create a new, arbitrary rule under the act of state doctrine, and its interpretation of the doctrine did not deviate from this Court's precedent." (Opp'n 11.) Other than expressing disagreement with UTICo, there is little substance to their argument.

UTICo's Petition explains that the District Court misapplied this Court's precedent, involving acts of confiscation by a foreign government of property

located outside the foreign territory, to this case. (*See* Pet. 32 and cases cited therein.) Contrary to the confiscation line of this Court's cases, the present case involves an act of a foreign government that *furthers* United States interests by compensating a Massachusetts corporation "for returning assets abroad to the State that is their rightful owner" and promoting the policies underlying federal RICO law of preventing "the release of stolen Ukraine assets into United States commerce." (Pet. 38.) Thus, the District Court's reliance on confiscation cases conflicts with this Court's precedent in *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), involving acts of foreign government in favor of United States interests. (Pet. 34-36.)

Contrary to respondents' argument, former Deputy Prosecutor General Obykhod's purported disavowal of the plain wording of the August 11, 1999 document "assign[ing]" (Pet. 143.) ownership of Ukraine's claims to UTICo in full is not a proper basis on which not to apply the act of state doctrine to the assignment. (Opp'n 13.) Respondents argued in the District Court that the assignment was a sham, based on the declaration of this Prosecutor that it was given "solely in order to give the court jurisdiction to hear Ukraine's claims." (AER 96, 101.) But Obykhod's declaration actually confirms the validity of the 1999 assignment by explaining it was intended to be in accordance with the 1998 agreement and to assign to UTICo claims of title to defendants' real property

located in the United States on the date of the assignment. (AER 101-02 [Obykhod Decl., ¶¶ 6-7].)

Respondents speculate that Ukraine easily could have provided evidence in this action supporting UTICo's position. (Opp'n 7.) But this argument ignores that Ukraine did just that when, on April 13, 1999, two months before UTICo filed this action, UPGO addressed a "statement of Amicus Curiae" to the District Court in support of UTICo. (App. 98-99; 118-42.)

III. The District Court's Interpretation Of Ukraine's Constitution Deserves To Be Second-Checked To Avoid Frustrating Another Sovereign's Powers To Assign Claims To Third-Parties In Its National Interest

The District Court's ruling based on its own consideration of Ukraine law under Federal Rule of Civil Procedure 44.1 went against the 2006 Ukraine Supreme Court decision on the subject. It also went against the expressed approval of UPGO's relationship with UTICo by the highest echelons of Ukraine's Executive. Most importantly, the District Court's interpretation of Ukraine's constitution leaves no organ of the State with the power to delegate the task of international asset recovery to non-Ukraine professionals and to assign claims belonging to Ukraine to such third-parties to further that objective.

Respondents fail to apprehend this result as a problem, arguing that Ukraine still could have sued in its own name. (Opp'n 13-14, n.6.) But a foreign government may wish not to waive its sovereign immunity, a consequence of suing in its own name in this country. There also may be situations where, as here, a third-party has earned ownership of a claim originally belonging to the foreign government through work performed for that country.

Recognizing Ukraine has power under its constitution to adopt a multitude of means to achieve the ends of its enumerated powers does not contradict express constitutional limitations on the State's authority. Regarding the third question presented, the Court should hold that, if a federal court must interpret the constitution of another nation, it should not do so in a manner that restricts the foreign government from exercising peaceful powers other sovereigns enjoy.

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